

**VEHICULAR ASSAULT
FIRST DEGREE
(D Felony)
(Premised on Vehicle & Traffic Law 1192 Violation
While NY License Suspended, Etc.)
PENAL LAW 120.04(1) & (2)(b)
(Committed on or after Nov. 1, 1985)**

The _____ count is Vehicular Assault in the First Degree.

Under our law, a person is guilty of Vehicular Assault in the First Degree when,¹ with criminal negligence, that person causes serious physical injury to another person, and causes such serious physical injury by operation of a vehicle²

[NOTE: Select appropriate alternative:

while he or she has .10 of one per centum or more by weight of alcohol in his or her blood as shown by chemical analysis of his or her blood, breath, urine or saliva.³

or while he or she is in an intoxicated condition.⁴

¹At this point, the statute states: he/she “commits the crime of vehicular assault in the second degree as defined in section 120.03.” The charge here substitutes for that language the definition of vehicular assault in the second degree as applied to operating a motor vehicle in violation of Vehicle and Traffic Law § 1192 (2), (3) and (4).

²At this point, the Vehicular Assault in the Second Degree statute states: “in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law...” This charge substitutes the operative language of each of those subdivisions. The court should select the appropriate subdivision to charge.

Charges for the remaining alternatives of vehicular assault in the first degree [Penal Law § 120.04(1)(2)(a)] are not provided, albeit the format of this charge may be used for those provisions as necessary.

³See Vehicle & Traffic Law § 1192 (2).

⁴See Vehicle and Traffic Law § 1192 (3).

or while his or her ability to operate such a vehicle is impaired by the use of a drug.^{5]}

[NOTE: At this point, there are two alternative elements. Add the following element only when the suspension or revocation resulted from refusal to submit to a chemical test; otherwise, follow the procedure set forth in footnote six.⁶

and commits such crime while knowing or having reason to know that his or her license (or his or her privilege of operating a motor vehicle in the state) (or his or her privilege of obtaining a license issued by the commissioner of motor vehicles) is suspended or revoked and such suspension or revocation is based upon a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four (1194) of the vehicle and traffic law.]

Some of the terms used in this definition have their own

⁵ See Vehicle & Traffic Law § 1192 (4).

⁶The definition of the crime contains two alternative elements--the one stated in the text, and:

“and commits such crime while knowing or having reason to know that his or her license or his or her privilege of operating a motor vehicle in the state or his or her privilege of obtaining a license issued by the commissioner of motor vehicles was suspended or revoked following a *conviction* for a violation of any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law.” (emphasis added).

If this element applies, it must be charged in a special information. Prior to trial, the defendant must be arraigned upon the special information 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 applicable parts of that element to the definition of the offense and the list of elements. See CPL 200.60[3]. See *People v Cooper*, 78 NY2d 476 (1991).

special meaning in our law. I will now give you the meaning of the following terms: “serious physical injury” [and] “criminal negligence” [and] [“vehicle”⁷] [and] [“drug”].

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.⁸

CRIMINAL NEGLIGENCE is not the same as that type of negligence you may be familiar with that permits a person injured by ordinary negligence to obtain a monetary judgment in a civil law suit. The carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence.

A person acts with CRIMINAL NEGLIGENCE with respect to serious physical injury when

that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that serious physical injury to another person 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

⁷See, Penal Law § 10.00(14) for the definition of “vehicle.” That definition encompasses the definition of “motor vehicle,” as defined in the Vehicle and Traffic Law section 125. Vehicle and Traffic Law section 1192 is applicable only to a “motor vehicle.” If the “vehicle” in issue is within the statutory and ordinary meaning of the term and not otherwise in issue, it should not be necessary to charge the definition. If it is necessary, the definition of “motor vehicle” should be charged.

⁸ See Penal Law § 10.00(10).

of care that a reasonable person would observe in the situation.⁹

[The term DRUG includes (specify).¹⁰

[NOTE: Here, either add the appropriate Vehicle and Traffic Law § 1192 charge, or if that Vehicle and Traffic Law provision has been separately charged to the jury, cross-reference the applicability of that charge to this crime.]

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 defendant, (defendant's name), caused serious physical injury to (specify); [and]
2. That the defendant did so with criminal negligence and by operation of a vehicle

[NOTE: Select appropriate provision:

while the defendant had .10 of one per centum or more by weight of alcohol in his/her blood as shown by chemical analysis of his/her blood, breath, urine or saliva.

or while the defendant was in an intoxicated condition.

or while the defendant's ability to operate such vehicle was impaired by the use of a drug.]

⁹ See Penal Law § 15.05(4); *People v. Boutin*, 75 NY2d 692,696 (1990).

¹⁰ See Vehicle & Traffic Law § 114-a.

[and]

- [3. That the defendant did so while knowing or having reason to know that his/her license (*or* his/her privilege of operating a motor vehicle in the state) (*or* his/her privilege of obtaining a license issued by the commissioner of motor vehicles) was suspended or revoked and such suspension or revocation was based upon a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four (1194) of the vehicle and traffic law. ¹¹]

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 Vehicular Assault in the First 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 Vehicular Assault in the First Degree as charged in the _____ count.

¹¹ If the alternative element is applicable, and the defendant admitted that element, then list *only* the first two elements for the jury. If the alternative element is applicable and the defendant has denied that element or remained mute, add the following:

“and 3. That the defendant did so while knowing or having reason to know that his/her license (*or* his/her privilege of operating a motor vehicle in the state) (*or* his/her privilege of obtaining a license issued by the commissioner of motor vehicles) was suspended or revoked following a conviction for a violation of subdivision (specify) of the provisions of section eleven hundred ninety-two (1192) of the vehicle and traffic law.”