

**VEHICULAR ASSAULT IN THE SECOND DEGREE**  
**(All terrain vehicle)**  
**Penal Law § 120.03(3)**  
**(Committed or after on or after Nov. 1, 2006)**

The (specify) count is Vehicular Assault in the Second Degree.

Under our law, a person is guilty of Vehicular Assault in the Second Degree when he or she operates an all terrain vehicle<sup>1</sup>

Select appropriate alternative(s):

while he or she has .08 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;<sup>2</sup>

or while he or she is in an intoxicated condition;<sup>3</sup>

or while his or her ability to operate such an all terrain vehicle is impaired by the use of a drug;<sup>4</sup>

or while his or her ability to operate an all terrain vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs. <sup>5</sup>

and as a result of such intoxication [or impairment by the use of a drug or by the combined influence of drugs or of alcohol and

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<sup>1</sup> At this point, the statute continues: “as defined in paragraph (a) of subdivision one of section twenty-two hundred eighty-one [2281(1)(a)] of the vehicle and traffic law and in violation of subdivision two, three, four, or four-a of section eleven hundred ninety-two [1192(2),(3),(4),(4-a)] of the vehicle and traffic law” This charge separately defines the term “all terrain vehicle” and substitutes the operative language of each of the Vehicle and Traffic Law subdivisions. The court should select the appropriate subdivision(s) to charge.

<sup>2</sup> Vehicle & Traffic Law § 1192 (2). At this point, the statute continues with “made pursuant to the provisions of section eleven hundred ninety-four of this article.”

<sup>3</sup> Vehicle and Traffic Law § 1192 (3).

<sup>4</sup> Vehicle & Traffic Law § 1192 (4).

<sup>5</sup> Vehicle & Traffic Law § 1192 (4-a).

any drug or drugs], operates such all terrain vehicle in a manner that causes serious physical injury to another person.<sup>6</sup>

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

ALL TERRAIN VEHICLE or "ATV" means any self-propelled vehicle which is manufactured for sale for operation primarily on off-highway trails or off-highway competitions and only incidentally operated on public highways providing that such vehicle does not exceed seventy inches in width, or one thousand pounds dry weight. [Provided, however, this definition shall not include a "snowmobile" or other self-propelled vehicles manufactured for off-highway use exclusively designed for travel on snow or ice, steered by skis or runners and supported in whole or in part by one or more skis, belts or cleats which utilize an endless belt tread].<sup>7</sup>

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.<sup>8</sup>

[The term DRUG includes (specify).<sup>9</sup> ]

*[NOTE: Here, either add the appropriate portions of the CJI2d Vehicle and Traffic Law § 1192 charge, or if that Vehicle and Traffic Law provision has been separately charged to the jury, incorporate it here by reference.]*

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<sup>6</sup> The text of the statute contains two references to causing "serious physical injury. In order to avoid redundancy and for clarity, the pattern charge contains one reference to such term.

<sup>7</sup> Vehicle and Traffic Law § 2281(1)(a).

<sup>8</sup> Penal Law § 10.00(10).

<sup>9</sup> The term "drug," when used in the Vehicle and Traffic Law, "means and includes any substance listed in section thirty-three hundred six of the public health law." Vehicle & Traffic Law § 114-a.

Under our law, if the People prove beyond a reasonable doubt that the defendant was operating an all terrain vehicle while unlawfully intoxicated [or impaired by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs<sup>10</sup> ] and while doing so caused serious physical injury to another person, then you may, but are not required to, infer that, as a result of such intoxication [or impairment by the use of alcohol or a drug or by the combined influence of drugs or of alcohol and any drug or drugs], the defendant operated the all-terrain vehicle in a manner that caused such serious physical injury. Whether or not to draw that inference is for you to decide and will depend entirely on your evaluation of the evidence.<sup>11</sup> <sup>11</sup>

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) , operated an all terrain vehicle:

*Select appropriate alternative(s):*

while the defendant had .08 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;

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<sup>10</sup> This paragraph reproduces the "rebuttable presumption" (*i.e.*, a permissible inference) set forth in Penal Law § 120.03(last paragraph). The words here in brackets, "by the combined influence of drugs or of alcohol and any drug or drugs," while an alternative element of the crime, do not appear at this point in the presumption statute as a predicate to the permissible inference which follows. The permissible inference which follows, however, does recite those words.

<sup>11</sup> Penal Law § 120.03(last paragraph). The Legislative Memorandum in support of this statute states that "the addition of the rebuttable presumption provision would create a causal link between a driver who causes serious physical injury or death and a presumption that it was his or her intoxication or impairment that was the cause of such serious physical injury or death."

*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;

*or* while the defendant's ability to operate such vehicle was impaired by the combined influence of drugs or of alcohol and any drug or drugs; and

2. That as a result of such intoxication [or impairment by the use of alcohol or a drug or by the combined influence of drugs or of alcohol and any drug or drugs], the defendant operated the all terrain vehicle in a manner that caused serious physical injury to another person.

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.