# VEHICULAR ASSAULT IN THE FIRST DEGREE
# (.18 alcohol)
# PENAL LAW 120.04(1)
# (Committed or after December 15, 2006)

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

A person is guilty of Vehicular Assault in the First Degree[1] when that person operates a motor vehicle while he or she has .18 of one per centum or more by weight of alcohol in his or her blood, as shown by chemical analysis of such person's blood, breath, urine or saliva[2] and as a result of such intoxication,[3] [or by the combined influence of alcohol and any drug or drugs], operates such motor vehicle in a manner that causes serious physical injury to another person.

By that definition, a person who operates a motor vehicle

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[1] At this point, the statute continues "when he or she commits the crime of vehicular assault in the second degree as defined in section 120.03 of this article, and ...." In lieu of that language, the appropriate language from the second degree crime is incorporated in this charge. Note, however, that subdivision one of section 120.03 provides that a person commits the crime of vehicular assault in the second degree when "he or she causes serious physical injury to another person" and "operates a motor vehicle in violation of subdivision two, three, four or four-a of section eleven hundred ninety-two of the vehicle and traffic law ..., 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 any drug or drugs, operates such motor vehicle ... in a manner that causes such serious physical injury to such other person." A person violates subdivision two of VTL § 1192 when he or she "operate[s] a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person's blood...." Since a person who operates a motor vehicle with a blood alcohol level of .18 will necessarily violate subdivision two of VTL § 1192, this charge does not contemplate instructing a jury concerning the other ways in which § 1192 may be violated. Moreover, since Vehicular Assault in the First and Second Degrees both require that the person cause serious physical injury, that element is included only once in this instruction.

[2] At this point, the statutory language is: "made pursuant to the provisions of section eleven hundred ninety-four of the vehicle and traffic law."

[3] The definition of vehicular assault in the second degree, Penal Law § 120.03, uses the language "intoxication or impairment," but since a person with a blood alcohol level of .18 is per se intoxicated [*see* VTL § 1192 (2) and (3)], the reference to impairment is omitted.

with a blood alcohol level of .18 of one per centum or more does so while intoxicated.[4]

The following term(s) used in that definition has/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.[5]

[The term DRUG includes (*specify*).[6]

To determine whether the defendant operated a motor vehicle while he/she had .18 of one per centum or more by weight of alcohol in his/her blood, you may consider the results of any test given to determine the alcohol content of defendant's blood.

A finding that the defendant operated a motor vehicle, and that thereafter the defendant had .18 of one per centum or more by weight of alcohol in his or her blood permits, but does not require, the inference that, at the time of the operation of the motor vehicle, the defendant had .18 of one per centum or more by weight of alcohol in his or her blood.[7] In deciding whether to draw that inference you may consider the results of any test given to determine the alcohol content of defendant's blood.

[*Note: Add if applicable:*
In this case, the device used to measure blood alcohol

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[4] VTL § 1192(2).

[6] Penal Law § 10.00(10).

[6] See Vehicle & Traffic Law § 114-a and Public Health Law § 3306.

[7] Penal Law § 120.04. *See People v Mertz*, 68 NY2d 136 (1986). In *Mertz*, the test was taken within two hours of defendant's arrest. In *People v McGrath*, 73 NY2d 826 (1988), the Court held that chemical tests performed pursuant to a court order issued in compliance with Vehicle and Traffic Law § 1194-a are not subject to the two-hour limitation. The time for administering a court-ordered chemical test is limited only by considerations of due process.

content was *(specify)*. That device is a generally accepted instrument for determining blood alcohol content. Thus, the People are not required to offer expert scientific testimony to establish the validity of the principles upon which the device is based.[8]]

In considering the accuracy of the results of any test given to determine the alcohol content of defendant's blood you must consider:

the qualifications and reliability of the person who gave the test;

the lapse of time between the operation of the motor vehicle and the giving of the test; and

whether the device used was in good working order at the time the test was administered; and whether the test was properly given.[9]

[*Note: Add if applicable:*
Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.[10]]

Under our law, if the People prove beyond a reasonable doubt that the defendant was operating a motor vehicle while unlawfully intoxicated by the use of alcohol [or by the combined influence of alcohol and any drug or drugs], and while doing so caused serious physical injury to another person, then you may,

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[8] This paragraph may be used only when the device employed is included on the Department of Health schedule (*see* 10 NYCRR § 59.4 [b]) of those devices satisfying its criteria for reliability (*see* 10 NYCRR § 59.4 [a]). Absent evidence to the contrary, such instruments are sufficiently reliable to permit the admissibility of test results without expert testimony (*see People v Hampe*, 181 AD2d 238, 241 [3d Dept 1992]).

[9] *See People v Freeland*, 68 NY2d 699 (1986).

[10] *See People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

but are not required to, infer that, as a result of such intoxication, the defendant operated the motor vehicle in a manner that caused such serious physical injury.[11]

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 two elements:

1. That on or about *(date)*, in the county of *(county)*, the defendant, *(defendant's name)*, operated a motor vehicle while the defendant had .18 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]; and

2. That as a result of that intoxication [or by the combined influence of alcohol and any drug or drugs], the defendant operated the motor 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.

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[11] Penal Law § 120.03, defining the crime of Vehicular Assault in the Second Degree. 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."