AGGRAVATED DRIVING WHILE INTOXICATED
(Combination Drugs/Alcohol, With a Child)
Vehicle & Traffic Law § 1192(2-a)(b)

EXPLANATORY NOTE ON DEFINITION OF IMPAIRMENT

In a prosecution for vehicular homicide, the basic crime, vehicular manslaughter in the second degree, Penal Law § 125.12(1), is committed in pertinent part when a person "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 the death of such other person. The language "such . . . impairment by the use of a drug" refers back to VTL 1192(4) and (4-a), which define the misdemeanors of driving while "impaired by the use of a drug" (subd 4) or by the combined use of drugs and alcohol (subd 4-a).

In *People v. Cruz*, 48 N.Y.2d 419, 428 (1979), a prosecution for driving while intoxicated, the Court of Appeals held that "intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." *Cruz* reasoned that because driving while intoxicated (a misdemeanor), was a more serious offense than driving while impaired by alcohol (a violation), the degree of impairment for intoxication by alcohol must be greater than that for the violation of driving while impaired by alcohol.

In *People v. Caden N.*, 189 A.D.3d 84, 90-91 (3d Dept 2020), *lv. to appeal denied*, 36 N.Y.3d 1050 (2021), a prosecution for vehicular manslaughter that alleged that the defendant's ability to operate a vehicle had been impaired by the use of drugs, the court applied Cruz's definition of "intoxication" in similarly holding that "impairment" by a drug requires that the motorist be "incapable of employing the physical and mental abilities which he [or she was] expected to possess in order

to operate a vehicle as a reasonable and prudent driver." *Caden N.* reasoned that because driving while intoxicated by alcohol and driving while impaired by drugs (or a combination of drugs and alcohol) were both misdemeanors, making both the basis of a prosecution for vehicular manslaughter "can only be deemed consistent with the legislative scheme if the same standard is applied to each misdemeanor category included in the vehicular manslaughter statute." 189 A.D.3d at 90. In so holding, the Third Department overruled *People v. Rossi*, 163 A.D.2d 660, 662 (3d Dept. 1990), "[t]o the extent that [it] can be read as holding that a conviction of vehicular manslaughter in second degree based upon a violation of Vehicle and Traffic Law § 1192(4) only requires proof that the motorist was impaired 'to any extent'." *Id.* at 91.

Caden N. did not explicitly discuss whether the standard for impairment for purposes of a prosecution for manslaughter in the second degree was also the standard to be applied in a prosecution for only VTL 1192(4), nor did *Caden N*. suggest that its definition of "impairment" for purposes of vehicle manslaughter was, notwithstanding the statutory language of "such…impairment by the use of a drug," different than that for the same term in a prosecution of VTL 1192(4). *Caden N.* simply applied in the vehicular manslaughter case before it, the *Cruz* rationale, that the misdemeanors of driving while intoxicated and driving while impaired by the use of drugs should have the same standard of what constitutes impairment.

For these reasons, until an appellate court decides otherwise, CJI2d has employed *Caden N.*'s definition of "impaired" in the instructions for vehicular manslaughter and the parallel, vehicular assault charges, and in those for the misdemeanor impairment by a drug or combination of drug and alcohol offenses in VTL 1192(4), (4-a) and (2-a)(b). We recognize, however, that a trial court is not bound to follow the CJI2d instruction and may instead decide to apply *Caden N.'s* definition of impairment for a vehicular manslaughter or assault charge and the impaired "to any extent" definition for a VTL driving while impaired by the use of a drug or combination of alcohol and drugs charge, as set forth in the footnote to the definition of impaired.

AGGRAVATED DRIVING WHILE INTOXICATED
(Combination Drugs/Alcohol, With a Child)
Vehicle & Traffic Law § 1192(2-a)(b)
(Committed on or after December 18, 2009)
(Revised Dec. 2021)[1]

The (*specify*) count is Aggravated Driving While Intoxicated.

Under our law, no person shall operate a motor vehicle[2] while the person's ability to operate such a motor vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs while a child who is fifteen years of age or less is a passenger in such motor vehicle.

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

MOTOR VEHICLE means every vehicle operated or driven upon a public highway [private road open to motor vehicle traffic] [parking lot] which is propelled by any power other than muscular power.[3]

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[1] The December 2021 revision was for the purpose of revising the definition of when a person's ability to operate a motor vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs to conform with the holdings of *People v. Caden N.*, 189 A.D.3d 84 (3d Dept 2020) (impaired by drug) and *People v Cruz*, 48 NY2d 419, 428 (1979) (impaired by alcohol).

[2] At this point, the statute continues "in violation of subdivision two, three, four or four-a of this section while a child who is fifteen years of age or less is a passenger in such motor vehicle." This charge addresses a violation of subdivision four-a.

[3] The term "motor vehicle" is defined in Vehicle and Traffic Law § 125. That definition contains exceptions which are not set forth in the text of the charge. The term "public highway" appearing in the definition of "motor vehicle" is itself separately defined in Vehicle and Traffic Law § 134. Further, while the definition of "motor vehicle" is restricted to a vehicle operated or driven on a "public highway," the provisions of Vehicle and Traffic Law § 1192 expressly apply to "public highways, private roads open to motor vehicle traffic and any other parking lot." Vehicle and Traffic Law § 1192(7). (The term "parking lot" is also specially defined by Vehicle and Traffic Law § 1192[7]. *See also People v. Williams*, 66 N.Y.2d 659 [1985].) The definition of "motor vehicle" has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

To OPERATE a motor vehicle means to drive it.

[*NOTE: Add the following if there is an issue as to operation:*

A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing the vehicle in motion, and when the motor vehicle is moving, or even if it is not moving, the engine is running.[4]]

The word DRUG includes (*specify*).[5]

A person's ability to operate a motor vehicle is IMPAIRED by the combined influence of drugs or of alcohol and any drug or drugs when a combination of drugs or of alcohol and any drug or drugs has rendered that person incapable of employing the physical and mental abilities which that person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.[6]

The law does not require any particular chemical or physical test to prove that a person's ability to operate a motor vehicle was impaired by a combination of drugs or of alcohol and a drug or drugs. To determine whether the defendant's ability to operate a motor vehicle was impaired, you may consider all the surrounding facts and circumstances, including, for example:

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[4] *See People v. Alamo*, 34 N.Y.2d 453, 458 (1974); *People v. Marriott*, 37 A.D.2d 868 (3rd Dept. 1971); *People v. O'Connor*, 159 Misc.2d 1072, 1074-1075 (Dist Ct, Suffolk, 1994); *See also People v. Prescott*, 95 N.Y.2d 655, 662 (2001).

[5] *See* Vehicle and Traffic Law § 114-a and Public Health Law § 3306(1).

[6] As indicated in footnote (1), this definition was revised in December 2021 to conform the holdings of *People v. Caden N.*, 189 A.D.3d 84 (3d Dept 2020) (drugs) and *People v. Cruz*, 48 N.Y.2d 419, 427 (1979) (alcohol). The former definition read: "A person's ability to operate a motor vehicle is IMPAIRED by the combined influence of drugs or of alcohol and a drug or drugs when a combination of drugs or of alcohol and a drug or drugs has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver."

the defendant's physical condition and appearance, balance
and coordination, and manner of speech;

the presence or absence of an odor of alcohol or a drug or drugs;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's sobriety or of the defendant's being under the influence of a drug or drugs];

[the circumstances of any accident];

[the results of any test for the presence of alcohol or a drug or drugs in the defendant's blood].

[*NOTE: If there is evidence of alcohol or a drug or drugs in the defendant's blood, add the following applicable paragraphs:]*

In considering the results of any test given to determine the 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;

whether the device used was in good working order at the time the test was administered; and

whether the test was properly given.[7]]

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[7] *See People v. Freeland,* 68 N.Y.2d 699, 701 (1986).

[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.[8]]

[*NOTE: If there was an improper refusal to submit to a test, add:*

Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of alcohol, a drug, or drugs in violation of law.[9]]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of 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)*, operated a motor vehicle;

2. That the defendant did so while his/her ability to operate a motor vehicle was impaired by the combined influence of drugs or of alcohol and any drug or drugs; and

3. That the defendant did so while a child who was fifteen years of age or less was a passenger in that motor vehicle.

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[8] *See People v. Mertz*, 68 N.Y.2d 136, 148 (1986); *People v. Freeland,* 68 N.Y.2d 699, 701 (1986).

[9] *See People v. Thomas*, 46 N.Y.2d 100 (1978) *appeal dismissed for want of a substantial federal question*, 444 U.S. 891 (1979).

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 that 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.