AGGRAVATED DRIVING WHILE INTOXICATED [1]
(.08, With a Child)
Vehicle & Traffic Law 1192 (2-a) (b)
(Committed on or after December 18, 2009)

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

Under our law, no person shall operate a motor vehicle [2] while such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva[3] and 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.

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[1] If the defendant has within the previous ten years been convicted of a violation of Vehicle and Traffic Law § 1192 (2), (2-a), (3), (4), or (4-a), or of Penal Law §§ 120.03, 120.04, 120.04-a, 125.12, 125.13, or 125.14, a conviction of aggravated driving while intoxicated is a class E felony *(see* Vehicle and Traffic Law § 1193 [1] [c] [i]). If the defendant has within the previous ten years twice been convicted of any of those crimes, a conviction of aggravated driving while intoxicated is a class D felony (*see* Vehicle and Traffic Law § 1193 [1] [c] [ii]). For the gradation of the offense for "special vehicles" *see* Vehicle and Traffic Law § 1193 (1) (d). Thus, an additional element of this crime when charged as a Class D or E felony is that the defendant has previously been convicted of one or more particular crimes. That element must be charged in a special information, and after commencement of trial the defendant must be arraigned on that special information. 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 element to the definition of the offense and the list of elements (*see* CPL 200.60; *People v Cooper*, 78 NY2d 476 [1991]).

[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 two.

[3] Vehicle and Traffic Law § 1192 (2).

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.[4]

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.[5]]

To determine whether the defendant had .08 of one per centum or more by weight of alcohol in his 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 .08 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

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[4] 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 NY2d 659 [1985]). The definition of "motor vehicle" has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

[5] *See People v Alamo*, 34 NY2d 453, 458 (1974); *People v Marriott*, 37 AD2d 868 (3d Dept 1971); *People v O'Connor*, 159 Misc 2d 1072, 1074-1075 (Suffolk Dist Ct 1994). *See also People v Prescott*, 95 NY2d 655, 662 (2001).

motor vehicle, the defendant had .08 of one per centum or more by weight of alcohol in his or her blood.[6]

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 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.[7]]

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;

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[6] *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.

[7] 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]).

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

whether the test was properly given. [8]

[*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.[9]]

As indicated in the definition I have given you, the crime charged in this count is committed when a person operates a motor vehicle while having .08 of one per centum or more by weight of alcohol in his or her blood as shown by a chemical analysis of the person's blood, breath, urine or saliva.

It is not an element of this crime that the person's driving was actually affected by alcohol consumption or that he or she exhibited characteristics usually associated with intoxication.

Nevertheless, in evaluating the evidence offered to prove that the defendant did operate a motor vehicle while having a blood alcohol content of .08 of one per centum or more, you may consider, in addition to evidence of the results of the chemical test and the circumstances under which it was administered, any evidence that, at times relevant to this charge, the defendant exhibited, or did not exhibit, signs of alcohol consumption.[10] Thus you may consider evidence of:

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

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

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

[12] *See People v Mertz*, 68 NY2d 136, 146 (1986).

the presence or absence of an odor of alcohol;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's sobriety;]

[the circumstances surrounding any accident].

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 he/she 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; 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.

If you find that 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.