ASSAULT IN THE SECOND DEGREE
(Inmate Causes Physical Injury)
Penal Law § 120.05(7)
(Committed on or after Sept. 1, 1981)[1]

Revised April, 2018 [2]

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

Under our law, a person is guilty of Assault in the Second Degree when,

Select applicable alternative, if it was not admitted by the defendant pursuant to CPL 200.60: [3]

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[1] The 2018 revision was for the purpose of accommodating the cases explained in footnote three and to amend the definition of "correctional facility" to include a legislative addition of a facility to that definition [L. 2017, c. 59] as explained in footnote five. Except for when that facility is in issue, the effective date remains Sept. 1, 1981.

[2] See footnote one.

[3] The Appellate Division has held that both alternatives are subject to the "special information" requirements of CPL 200.60. *People v. Dove*, 86 A.D.3d 715 (3d Dept. 2011) ("the indictment improperly alleged that he was incarcerated on a prior criminal charge," and "the procedures employed in CPL 200.60 should have been followed"); *People v. Rowe*, 105 A.D.3d 1088, 1089 (3d Dept. 2013) ("the failure to allege the element of confinement in a correctional facility was not a defect . . . this element is not to be included in the indictment, but is to be separately presented by special information to avoid prejudice"); *People v Gaddy*, 191 A.D.2d 735, 736 (3rd Dept. 1993) ("When the enhancing element of a crime is not merely the existence of a prior conviction but also includes related facts, the pleading and proof of which would necessarily reveal the conviction," the "special information" procedures of CPL 200.60 apply); *People v Ali*, 147 A.D.2d 847, 848 (3rd Dept. 1989) ("the prosecution could not allege in the indictment defendant's presence in the correctional facility"). *Cf. People v Cooper*, 78 N.Y.2d 476 (1991). Accordingly, the applicable element must be charged in a "special information" and the defendant must be arraigned upon it pursuant to CPL § 200.60(3). If, upon that 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. The *Dove* court appeared to recognize, however, that even where the defendant admits the element, disclosure of defendant's status as an inmate at a facility ""was unavoidable'." *Dove,* 86 AD3d at 716.

having been charged with a crime and while confined in a correctional facility pursuant to such charge,

having been convicted of a crime and while confined in a correctional facility pursuant to such conviction,

with intent to cause physical injury to another person, he or she causes such injury to that person [*or* to a third person].

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

PHYSICAL INJURY means impairment of physical condition or substantial pain.[33]

INTENT means conscious objective or purpose. Thus, a person acts with intent to cause physical injury to another when that person's conscious objective or purpose is to cause physical injury to another.[4]

[*NOTE: In a case of "transferred intent," add the following paragraph:*

Under our law, it is not required that the person who is injured be the same person who was intended to be injured.]

[A CORRECTIONAL FACILITY means any institution operated by the state department of corrections and community supervision, (*or* any local correctional facility, that is, any county jail, county penitentiary, county lockup, city jail, police station jail, town or village jail or lockup, court detention pen, hospital prison ward or specialized secure juvenile detention facility for older youth), (*or* any place used, pursuant to a contract with the

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[3] Penal Law § 10.00(9); *See People v. Chiddick*, 8 NY3d 445 (2007).

[4] See Penal Law § 15.05(1).

state or a municipality, for the detention of persons charged with or convicted of a crime).][5]

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 physical injury to *(specify)*; [and]

2. That the defendant did so with intent to cause physical injury to *(specify);* [and]

[3. That, at that time, the defendant (was charged with a crime / was convicted of a crime) and was confined in a correctional facility pursuant to that (charge / conviction)]. [6]

If you find that the People have proven beyond a reasonable doubt both [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 either one or both [any one or more] of those elements, you must find the defendant guilty of this crime.

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[5] *See* Correction Law § 40(3) for the definition of "correctional facility," and Correction Law § 40(2) for the definition of the term "local correctional facility" used in the definition of "correctional facility." Effective April 10, 2017, “specialized secure juvenile detention facility for older youth” was added to the definition of “local criminal facility.”

[6] If the defendant has admitted element three when arraigned upon the special information, as explained in footnote three, then the offense will consist of only the first two elements. If the defendant has denied element three or stood mute, then element three should read to the jury.