**AGGRAVATED DRIVING WHILE INTOXICATED**

**(Drugs, With a Child)**

**Vehicle & Traffic Law 1192(2-a)(b)**

**(Committed on or after December 18, 2009)**

**(Revised Dec. 2021)[[1]](#footnote-1)**

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

Under our law, no person shall operate a motor vehicle[[2]](#footnote-2) while the persons ability to operate such a motor vehicle is impaired by the use of a drug[[3]](#footnote-3) 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.[[4]](#footnote-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]](#footnote-5)]

The word DRUG includes (*specify*).[[6]](#footnote-6)

A person’s ability to operate a motor vehicle is IMPAIRED by the use of a drug when that person’s use of a drug 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.[[7]](#footnote-7)

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

the defendants physical condition and appearance, balance

and coordination, and manner of speech;

the presence or absence of an odor of a drug

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendants being under the influence of a drug];

[the circumstances of any accident];

[the results of any test for the presence of drugs in the defendants blood].

[*NOTE: If there is evidence of drugs in the defendants blood, add the following applicable paragraphs:]*

In considering the results of any test given to determine the content of defendants 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.[[8]](#footnote-8)]

[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]](#footnote-9)]

[*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 a drug in violation of law.[[10]](#footnote-10)]

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, *(defendants name)* , operated a motor vehicle;

2. That the defendant did so while his/her ability to operate a motor vehicle was impaired by the use of a drug; 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 the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find 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.

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 use of a drug to accord with the holding of *People v. Cadan*, 189 A.D.3d 84 (3d Dept 2020). *Cf. People v Cruz*, 48 NY2d 419, 428 (1979). [↑](#footnote-ref-1)
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. [↑](#footnote-ref-2)
3. In Vehicle and Traffic law 1192(4), the word drug is followed by the words as defined in this chapter. Since the charge later sets forth the definition of drug, the words as defined in this chapter have been omitted. [↑](#footnote-ref-3)
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 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. [↑](#footnote-ref-4)
5. *See People v. Alamo*, 34 N.Y.2d 453, 458 (1974); *People v. Marriott*, 37 A.D.2d 868 (3rd Dept. 1971); *People v. OConnor*, 159 Misc.2d 1072, 1074-1075 (Dist. Ct., Suffolk, 1994); *See also People v. Prescott*, 95 N.Y.2d 655, 662 (2001). [↑](#footnote-ref-5)
6. See Vehicle and Traffic Law 114-a and Public Health Law 3306(1). [↑](#footnote-ref-6)
7. As indicated in footnote (1), this definition was revised in December 2021 to accord with the holding of *People v. Cadan*, 189 A.D.3d 84 (3d Dept 2020). The former definition read: *“*A persons ability to operate a motor vehicle is IMPAIRED by the use of a drug when that person's use of a drug 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.” [↑](#footnote-ref-7)
8. *See People v. Freeland,* 68 N.Y.2d 699, 701 (1986). [↑](#footnote-ref-8)
9. *See People v. Mertz*, 68 N.Y.2d 136, 148 (1986); *People v. Freeland,* 68 N.Y.2d 699, 701 (1986). [↑](#footnote-ref-9)
10. *See People v. Thomas*, 46 N.Y.2d 100 (1978), appeal dismissed. for want of a substantial federal question, 444 U.S. 891 (1979). [↑](#footnote-ref-10)