

**RECKLESS VEHICULAR HOMICIDE
(RECKLESS WITH DRIVING WHILE INTOXICATED OR REFUSAL TO SUBMIT TO
A BREATHALYZER TEST)
(N.J.S.A. 2C:11-5)**

The defendant (Name) is charged in count _____ with the crime of reckless vehicular homicide. The indictment alleges:

(READ APPROPRIATE COUNT OF INDICTMENT)

The statute upon which this charge is based provides:

Criminal homicide constitutes reckless vehicular homicide when it
is caused by driving a vehicle (or vessel) recklessly.

In order for you to find the defendant guilty of this crime, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant was driving a vehicle [or vessel];¹
2. That the defendant caused the death of (name victim); and
3. That the defendant caused such death by driving the vehicle [or vessel] recklessly.

In order to find that the defendant caused (victim's) death, you must find that (victim) would not have died but for defendant's conduct.²

[NOTE: In cases where Causation - Removal of Life Support is an issue, the jury should be instructed as follows:

You have heard testimony that on [date], **(insert victim's name)** was taken off life support and that he/she died at some point after this was done. Should you find beyond a

¹ N.J.S.A. 2C:11-5d provides: "As used in this section, 'auto or vessel' means all means of conveyance propelled otherwise than by muscular power."

² N.J.S.A. 2C:2-3a(1). If proximate cause is an issue, N.J.S.A. 2C:2-3c should be charged.

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reasonable doubt that **(insert victim's name)** died from medical complications that resulted from injuries caused by defendant's actions, the removal of life support, in this case (method of removal), is not an intervening cause that relieves defendant of any criminal liability for those actions.³ That is, if defendant's actions set in motion **(insert victim's name)** need for life support, without which death would result naturally, then the causal link between defendant's action and the death of **(insert victim's name)** was not broken by an unforeseen, extraordinary act when **(insert victim's name)** was removed from life support and then expired, unless there was an intervening volitional act of another.]⁴

[CHARGE IN ALL CASES]

A person acts recklessly when he/she consciously disregards a substantial and unjustifiable risk that death will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the defendant's conduct and the circumstances known to him/her, disregard of the risk involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation.

In other words, in order for you to find that the defendant drove a vehicle [or vessel] recklessly, the State must prove beyond a reasonable doubt that the defendant was aware he/she was operating a vehicle [or vessel] in such a manner or under such circumstances as to create a substantial and unjustifiable risk of death to another. The State must also prove beyond a reasonable doubt that the defendant consciously disregarded this risk and that the disregard of the risk was a gross deviation from the way a reasonable person would have conducted

³ State v. Pelham, 176 N.J. 44, 455-456 and n. 2 (2003).

⁴ Pelham, 176 N.J. at 467.

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himself/herself in the situation.

In determining whether the State has proven beyond a reasonable doubt that defendant acted recklessly, defendant's unawareness of a risk, due to self-induced intoxication⁵, is immaterial.⁶ In other words, you may find that the State has proven recklessness beyond a reasonable doubt even though the defendant was unaware of a risk of which he/she would have been aware were he/she not intoxicated.⁷

Recklessness is a condition of the mind that cannot be seen and that can often be determined only from inferences from conduct, words, or acts. It is not necessary for the State to produce a witness to testify that the defendant stated that he/she acted with a particular state of mind. It is within your power to find that proof of recklessness has been furnished beyond a reasonable doubt by inferences that may arise from the nature of the acts and circumstances surrounding the conduct in question.

**[WHERE A VIOLATION OF THE MOTOR VEHICLE STATUTES
IS ALLEGED, ADD THE FOLLOWING:]**

The State alleges the defendant's conduct involved [a] violation[s] of the motor vehicle laws of this State. Specifically, it is alleged that the defendant **[list motor vehicle violations alleged and their elements]**. It may be necessary for you to determine **[Choose as appropriate: (whether defendant operated a motor vehicle while in violation of New Jersey's**

⁵ There is no legal distinction between intoxication resulting from alcohol use and that resulting from drug use. Cannel, New Jersey Criminal Code Annotated, Comment 2 to N.J.S.A. 2C:2-8 (Gann 2004) (citing State v. Sette, 259 N.J. Super. 156, 173-74 (App. Div. 1992), certif. denied, 130 N.J. 597 (1992); State v. Green, 318 N.J. Super. 361, 370 (App. Div. 1999), aff'd o.b., 163 N.J. 140 (2001).

⁶ N.J.S.A. 2C:2-8b. For the exact statutory definition of self-induced intoxication, please see the full text of N.J.S.A. 2C:2-8b.

⁷ 1971 Code Commentary to N.J.S.A. 2C:2-8 as reproduced in Cannel, Comment to N.J.S.A. 2C:2-8

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Driving While Intoxicated statute and/or whether defendant thereafter refused to submit to a breathalyzer examination as required by New Jersey law) / (whether defendant violated the statute regarding using a hand-held wireless communication device) / (whether defendant failed to maintain a lane)], as I will explain shortly. However, with (that/those) possible exception(s), whether a defendant is guilty or not guilty of a motor vehicle offense will be determined by an appropriate court.⁸ It is not your job to decide whether he/she is guilty or not guilty of any motor vehicle offense other than **[Choose as appropriate: (Driving while Intoxicated and/or refusal) / (using a hand-held wireless communication device) / (failing to maintain a lane)]**. Rather, you may consider the evidence that he/she committed [a] motor vehicle offense[s] in deciding whether he/she was driving recklessly.

[CHARGE WHERE APPROPRIATE: DRIVING WHILE INTOXICATED]

You may draw an inference that defendant was driving recklessly if you are satisfied that he/she was driving while intoxicated in violation of New Jersey's Driving While Intoxicated statute.⁹

In order for you to find that the defendant violated the Driving While Intoxicated statute¹⁰, the State must prove beyond a reasonable doubt that the defendant operated a motor vehicle [or vessel] while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operated a motor vehicle with a blood alcohol concentration of 0.08%¹¹

⁸ State v. Muniz, 118 N.J. 319 (1990).

⁹ N.J.S.A. 2C:11-5a.

¹⁰ The charge will have to be modified where the State alleges refusal to submit to a breathalyzer examination under N.J.S.A. 39:4-50.4a.

¹¹ Note that N.J.S.A. 39:4-50 was amended, effective January 20, 2004, and that for crimes alleged to have been committed before that date a blood alcohol concentration of 0.10% will be required.

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or more by weight of alcohol in his/her blood.¹²

However, you are never required or compelled to draw this inference. It is your exclusive province to determine whether the facts and circumstances shown by the evidence support any inference and you are always free to accept or reject the inference as you deem appropriate.

[CHARGE WHERE APPROPRIATE: LACK OF SLEEP]

In this case, the State alleges the defendant may have fallen asleep while driving [or that defendant was driving after having been without sleep for a period in excess of 24 consecutive hours]. Proof that defendant may have fallen asleep [or that defendant was driving after having been without sleep for a period in excess of 24 consecutive hours] may give rise to an inference that defendant was driving recklessly.¹³ However, you are never required or compelled to draw this inference. It is your exclusive province to determine whether the facts and circumstances shown by the evidence support any inference and you are always free to accept or reject the inference as you deem appropriate.

**[CHARGE WHERE APPROPRIATE:
HAND-HELD WIRELESS COMMUNICATION DEVICE]**

The State alleges that the defendant was using a hand-held wireless telephone while driving a motor vehicle in violation of New Jersey law.¹⁴ The pertinent part of that law states that

¹² N.J.S.A. 39:4-50. There is a substantial body of case law interpreting this statute. Where a violation of N.J.S.A. 39:4-50 is an element of the offense, such as when the defendant is charged with First Degree Reckless Vehicular Homicide pursuant to N.J.S.A. 2C:11-5.3b(3), see the final portion of this charge.

¹³ N.J.S.A. 2C:11-5a.

¹⁴ The statute does not apply to the use of a citizen's band radio or two-way radio by an operator of a moving commercial motor vehicle or authorized emergency vehicle on a public road or highway.

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the use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway is unlawful except when the telephone is a hands-free wireless telephone or the electronic device is used hands-free, provided that the actual placement of the phone in the vehicle does not interfere with the operation of federally required safety equipment, and the operator exercises a high degree of caution in the operation of the motor vehicle.¹⁵

[CHOOSE AS APPROPRIATE]

The operator of a motor vehicle may use a hand-held wireless telephone while driving with one hand on the steering wheel only if:

- The operator has reason to fear for his/her life or safety, or believes that a criminal act may be perpetrated against himself or another person.¹⁶
- The operator is using the telephone to report to appropriate authorities a fire, traffic accident, a serious road hazard or medical or hazardous materials emergency, or to report the operator of another motor vehicle who is driving in a reckless, careless or otherwise unsafe manner or who appears to be driving under the influence of alcohol or drugs.¹⁷

[RESUME CHARGE ON HAND HELD WIRELESS COMMUNICATION DEVICE]

“Hands-free wireless telephone” means a mobile telephone that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of

N.J.S.A. 39:4-97.3.

¹⁵ N.J.S.A. 39:4-97.3a.

¹⁶ N.J.S.A. 39:4-97.3b(1).

¹⁷ N.J.S.A. 39:4-97.3b(2).

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such mobile telephone, by which a user engages in a conversation without the use of either hand; provided, however, this definition shall not preclude the use of either hand to activate, deactivate, or initiate a function of the telephone.¹⁸

“Use” of a wireless telephone or electronic communication device shall include, but shall not be limited to, talking or listening to another person on the telephone, text messaging, or sending an electronic message via the wireless telephone or electronic communication device.¹⁹

Proof that defendant used a hand-held wireless communication device in violation of this motor vehicle statute may give rise to an inference that defendant was driving recklessly.²⁰ However, you are never required or compelled to draw this inference. It is your exclusive province to determine whether the facts and circumstances shown by the evidence support any inference and you are always free to accept or reject the inference as you deem appropriate.

**[CHARGE WHERE APPROPRIATE:
FAILURE TO MAINTAIN LANE]²¹**

The State alleges that the defendant failed to maintain a lane while operating a motor vehicle, in violation of N.J.S.A. 39:4-88. That section of the law states,

When a roadway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulation(s):

[CHOOSE AS APPROPRIATE]

a. A vehicle shall normally be driven in the lane nearest the right-hand edge or curb of the roadway when that lane is available for travel, except when overtaking another vehicle or in preparation for a left turn.

¹⁸ N.J.S.A. 39:4-97.3b(2).

¹⁹ N.J.S.A. 39:4-97.3b(2).

²⁰ N.J.S.A. 2C:11-5a.

²¹ N.J.S.A. 2C:11-5a. This section should only be read for offenses that occurred after January 16, 2018.

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b. A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.

c. Upon a highway which is divided into 3 lanes, a vehicle shall not be driven in the center lane except when overtaking or passing another vehicle or in preparation for a left turn or unless the center lane is at the time allocated for traffic moving in the direction the vehicle is proceeding and is signposted to give notice of that allocation.

d. The State Highway Commissioner may by regulation or local authorities may by resolution or ordinance with respect to highways under their jurisdiction designate right-hand lanes for slow moving traffic and inside lanes for traffic moving at the speed designated for the district as provided under this chapter, and when the lanes are signposted or marked to give notice of the designation a vehicle may be driven in any lane allocated to traffic moving in the direction in which it is proceeding, but when traveling within the inside lanes the vehicle shall be driven at approximately the speed authorized in such lanes and speed shall not be decreased unnecessarily so as to block, hinder or retard traffic.

e. When such roadway had been divided in such a manner that there are three or more lanes for traffic in any one direction, no truck of 10,000 pounds registered gross weight or over shall be driven in the farthest left-hand lane, except:

- (1) when and to the extent necessary to prepare for a left turn; a truck may be driven in the farthest left lane for up to one mile to prepare for a left hand turn as authorized under this paragraph;
- (2) when necessary to enter or leave such roadway by entrance or exit to or from the left lane ; a truck may be driven in the farthest left lane for up to one mile to prepare to enter or leave the roadway as authorized under this paragraph;
- (3) when reasonably necessary in response to emergency conditions; for the purposes of this paragraph, "emergency conditions" shall include, but not be limited to: poor visibility, snow, accidents, or the presence of emergency vehicles.

Proof that the defendant violated this section may give rise to an inference that defendant

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was driving recklessly. However, you are never required or compelled to draw this inference. It is your exclusive province to determine whether the facts and circumstances shown by the evidence support any inference and you are always free to accept or reject the inference as you deem appropriate.

[CHARGE IN ALL CASES]

In conclusion, the three elements of the crime of reckless vehicular homicide are:

1. That the defendant was driving a vehicle [or vessel];
2. That the defendant caused the death of (name victim); and
3. That the defendant caused such death by driving the vehicle [or vessel] recklessly.

If the State has failed to prove any element beyond a reasonable doubt, then you must find the defendant not guilty of vehicular homicide.

If you are satisfied that the State has proven each and every one of these elements beyond a reasonable doubt, then you must find the defendant guilty of vehicular homicide.²²

[CHARGE IF JURY WAS INSTRUCTED ON THE N.J.S.A. 2C:11-5(b)(5) PERMISSIVE INFERENCE (FAILURE TO MAINTAIN LANE)):

²² If the State seeks a mandatory period of parole ineligibility under N.J.S.A. 2C:11-5b(1), due to driving while intoxicated or driving while suspended at the time of the incident, a bifurcated proceeding may be required to establish the necessary predicate facts. N.J.S.A. 2C:11-5b provides for a mandatory sentence to be imposed by the court following a sentencing hearing requiring proof of specified elements by a preponderance of the evidence, but the Sixth Amendment requires that a jury find any fact that increases the mandatory minimum sentence beyond a reasonable doubt. Alleyne v. United States, 133 S.Ct. 2151 (2013), State v. Grate, 220 N.J. 317, 334 (2015). Thus, these sentencing issues should now be presented to the jury for its consideration under the reasonable doubt standard. State v. Johnson, 166 N.J. 523 (2001); State v. Stanton, 339 N.J. Super. 1 (App. Div. 2001), certif. granted 169 N.J. 609 (2001). In appropriate cases, bifurcation may be necessary to prevent prejudice to defendant (e.g., where driving on the revoked list is relevant to sentencing but not to guilt). See State v. Bakka, 350 N.J. Super. 43 (App. Div. 2002).

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If you have found the defendant guilty of Reckless Vehicular Homicide you must then answer an additional question on your Verdict Sheet, asking whether the defendant engaged in any additional conduct, other than failing to maintain a lane, that would constitute driving recklessly.²³ The defendant has asserted that he/she engaged in no other reckless conduct in the operation of the vehicle and the State alleges otherwise.

The defendant has the burden of proving the absence of any other reckless conduct by a preponderance of evidence. The term "preponderance of the evidence" means the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to your minds.

If you find that the defendant has met his/her burden in establishing the absence of additional reckless conduct, other than failing to maintain a lane, answer "No" on your Verdict Sheet.. If, on the other hand, you find that the Defendant has not met his/her burden, then answer "Yes" on your verdict sheet.

Keep in mind, however, that although the burden rests upon the defendant to establish the absence of additional reckless conduct by a preponderance of the credible evidence, the burden of proving the defendant guilty of the offense charged beyond a reasonable doubt is always on the State, and that burden never shifts to the defendant.

[CHARGE WHEN THE DEFENDANT IS CHARGED WITH RECKLESS VEHICULAR HOMICIDE IN THE FIRST DEGREE, PURSUANT TO N.J.S.A. 2C:11-5b(3)]

If, and only if, you find the defendant guilty of the crime of Reckless Vehicular Homicide

²³ N.J.S.A. 2C:11-5b(5).

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beyond a reasonable doubt, you must also decide whether the State has proven beyond a reasonable doubt that the defendant operated the auto [or vessel] while in violation of New Jersey's driving while intoxicated law [or that defendant thereafter refused to submit to a breathalyzer examination as required by New Jersey law], and if so, whether the State has further proven beyond a reasonable doubt that he/she did so in a school zone or school crossing.

In order for you to find that the defendant violated the driving while intoxicated law, the State must prove beyond a reasonable doubt that the defendant operated a motor vehicle [or vessel] while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operated a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in his/her blood.

To prove a person guilty of an "under the influence" driving while intoxicated, the State must establish intoxication based on evidence of a defendant's physical and behavioral characteristics at the time of arrest.²⁴ This is determined based on the totality of the facts and circumstances observable at the time of the incident. You have (heard testimony/ seen video) about certain tests that were performed by the defendant at the request of police. The defendant's performance on those tests are one of the factors to be considered, but should not be relied upon to the exclusion of other factors when determining if the defendant was under the influence of alcohol or drugs. "Under the influence" is defined as a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit producing drugs.²⁵ It is a condition which so

²⁴ State v. Bealor, 187 N.J. 574 (2006).

²⁵ State v. Tamburro, 68 N.J. 414, 421 (1975).

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affects the judgment or control of a motor vehicle operator as to make it improper for him/her to drive on the highway.²⁶

To prove a person guilty of driving while intoxicated based on blood alcohol concentration, the State must establish evidence of the results a (blood/breath) test establishing a blood alcohol concentration of 0.08 or more, by weight of alcohol in his blood. However, even where (blood/breath) test results are admitted into evidence, the State's burden of proof at the end of the trial is more rigorous than what is required for evidence to be admissible.²⁷ After hearing all of the testimony and considering all of the admitted exhibits, you ultimately must be persuaded that the elements of the offense, including the defendant's blood alcohol concentration, have been proven beyond a reasonable doubt.²⁸ In other words, the fact that the evidence was admitted should not direct you to find that this defendant violated the driving while intoxicated statute. Rather, you must be convinced beyond a reasonable doubt that the results are reliable.

If you are convinced beyond a reasonable doubt that the defendant violated the Driving While Intoxicated statute while he/she committed the crime of Reckless Vehicular Homicide, you must then decide whether the State has proven beyond a reasonable doubt that

[SELECT APPROPRIATE ALTERNATIVE(S)]

the defendant did so while on any school property used for school purposes which was owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such property.

²⁶

Id.

²⁷

State v. Campbell, 436 N.J. Super. 264, 272 (2014).

²⁸

Id.

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[OR]

the defendant did so while driving through a school crossing, if the municipality, by ordinance or resolution, had designated the school crossing as such. A “school crossing” means that portion of a highway where school children are required to cross the highway in the vicinity of a school.^{29]}

[OR]

the defendant did so while driving through a school crossing knowing that juveniles were present, if the municipality had not designated the school crossing as such by ordinance or resolution. A “school crossing” means that portion of a highway where school children are required to cross the highway in the vicinity of a school.^{30]}

It is no defense to a prosecution under the statute that the defendant was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property [**OR** while driving through a school crossing that has been designated as such by municipal ordinance or resolution]. Nor is it a defense in such a case that no juveniles were present on the school property [**OR** crossing zone] at the time of the offense, or that school was not in session.^{31]}

[CHARGE IF APPLICABLE:

The additional element of operating a vehicle [or vessel] in violation of the Driving While Intoxicated statute through a school crossing that has **not** been designated as such by municipal ordinance or resolution can only be found where there is proof beyond a reasonable

²⁹ N.J.S.A. 39:1-1.

³⁰ N.J.S.A. 39:1-1.

³¹ N.J.S.A. 2C:11-5b(3). Note that the last sentence of this paragraph does not apply to the third alternative specified in N.J.S.A. 2C:11-5b(3)(c), which requires that a defendant knows juveniles to be present in a school crossing that has not been designated as such by municipal ordinance or resolution.

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doubt that the defendant knew that juveniles were present at the time. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if a person is aware that his/her conduct is of that nature, or that such circumstances exist, or a person is aware of a high probability of their existence. A person acts knowingly with respect to a result of his/her conduct if a person is aware that it is practically certain that his/her conduct will cause such a result. One is said to act knowingly if one acts with knowledge, if one acts consciously, if he/she comprehends his/her acts.³²

Knowledge, like recklessness, is a condition of the mind that cannot be seen and that can often be determined only from inferences from conduct, word, or acts. As I told you before, it is not necessary for the State to produce a witness to testify that the defendant stated that he/she acted with a particular state of mind. It is within your power to find that proof of knowledge has been furnished beyond a reasonable doubt by inferences that may arise from the nature of the acts and circumstances surrounding the conduct in question.].

Record your additional finding(s) in the place(s) provided on your verdict sheet.

³² N.J.S.A. 2C:2-2b(2).