

AFFIRMATIVE DEFENSE OF DURESS
Penal Law § 40.00
(Effective September 1, 1967)
(Revised June 2020)¹

If the affirmative defense of duress is applicable, omit the final two paragraphs of the instructions on the crime charged, and substitute the following:

If you find that the People have not proven beyond a reasonable doubt any one of those elements, you must find the defendant not guilty.

If you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty, you will not consider this affirmative defense.

Under our law, it is an affirmative defense to this charge that the defendant engaged in the prohibited conduct because he/she was coerced to do so by the use or threatened imminent use of unlawful physical force upon him/her [or a third person], which force or threatened force a person of reasonable firmness in the defendant's situation would have been unable to resist. ²

The defense of duress is not available if the defendant intentionally or recklessly placed himself/herself in a situation in which it was probable that he/she would be subjected to duress.³

[Note: Add if applicable

[In deciding whether the defendant was coerced into committing this crime, you may consider whether he/she was a person predisposed to criminal conduct and not a person whose will needed to be overcome. On this issue, there is evidence in the case that on another occasion, the defendant

Select appropriate alternative(s):

engaged in criminal conduct of the same nature

was convicted of a crime of the same nature.⁴

That evidence was offered solely in an attempt to establish that the defendant was predisposed to engage in criminal conduct and thus was not coerced into committing this crime. If you find the evidence believable, you may consider it for that limited purpose and for none other.]

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

If you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt the elements of (specify), you must find the defendant guilty of that crime.

If you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find

the defendant not guilty of (*specify*).]

¹ The June 2020 revision was for the purpose of clarifying the requirement that a defendant's criminal conduct or criminal conviction should be of the same nature of the crime(s) he/she is being tried for. See footnote four.

² Penal Law § 40.00 (1). See *People v. Brown*, 68 A.D.2d 503 (2d Dept 1979); *People v. Vespa*, 165 A.D.2d 679 (1st Dept 1990); *People v. Amaton*, 99 A.D.2d 495 (2d Dept 1984); *People v. Ramjohn*, 513 N.Y.S.2d 830 (2d Dept 1987); *People v. Lane*, 112 A.D.2d 247 (2d Dept 1985).

³ Penal Law §40.00(2). *People v. Campos*, 108 A.D.2d 751 (2d Dept 1985); *People v. Amato*, 99 A.D.2d 495 (2d Dept 1984).

⁴ See *People v. Calvano*, 30 N.Y.2d 199, 205 (1972) (when the defendant raises the defense of duress, "prior criminal acts of the same nature [as that with which he is charged] may properly be proved to rebut the defense that defendant was 'coerced' into the transgression"); *People v. Rosado*, 244 A.D.2d 772, 776 (3d Dept. 1997) (in a prosecution that included a robbery charge, it was "proper for the People to introduce the underlying facts of the youthful offender adjudication for robbery to prove a disposition to commit acts of a similar nature in order to rebut the implicit denial of criminal intent raised by this defense [of duress]"); *People v. Williams*, 38 A.D.3d 577, 578 (2d Dept. 2007) (because the defendant raised the defense of duress in a prosecution for attempted burglary, the trial court "properly permitted the prosecutor to cross-examine the defendant on the underlying facts of his prior larcenous-type convictions, including, among others, burglary and attempted burglary").