

CRIMINAL SEXUAL ACT IN THE THIRD DEGREE
(Incapacity to Consent by Person
Subject to Care and Custody)
Penal Law § 130.40 (1)
(Committed on or after Nov. 1, 2003)¹
(Revised Dec. 2013 and July 2018)²

The (*specify*) count is Criminal Sexual Act in the Third Degree.

Under our law, a person is guilty of Criminal Sexual Act in the Third Degree when he or she engages in

Select applicable alternative(s):
oral sexual conduct [or]
anal sexual conduct

¹ This instruction is applicable to crimes committed on or after November 1, 2003, except:

(1) for the provision set forth in Penal Law § 130.05 (3)(i) which was added by the laws of 2012, chapter 501, effective January 16, 2013 and which is set forth in the text to which footnote 23 is appended.
and

(2) for the provision set forth in Penal Law § 130.05 (3)(j), which was added by the laws of 2018, chapter 55, effective May 12, 2018, and which is set forth in the text to which footnote 24 is appended.

² The revisions were to accommodate the statutory amendments noted in footnote one.

The charge has also been revised to make uniform the instructions for article 130 sections regarding people who are incapable of consenting that include as an element that the defendant is not married to the complainant or that contain the statutory defense that the defendant was married to the complainant at the time of the alleged offense. See Penal Law §§ 130.05 [3] and 130.10 (4). For instances where “not married to the [complainant]” is a statutory element, that language appears in the portions of the instructions that mirror the statutory language of the appropriate subdivision, then as applicable, that element must be included in the court’s charge. For instances where marriage to the complainant is a defense, the instructions contain a note indicating the circumstances under which the defense applies; if the defense is in issue, the “not married to the [complainant]” element must be included in the court’s charge.

with another person who is incapable of consent.³

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

Select applicable alternative(s):

[ORAL SEXUAL CONDUCT means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.⁴]

[ANAL SEXUAL CONDUCT means conduct between persons consisting of contact between the penis and anus.⁵]

It is an element of this crime that the [oral (or) anal] sexual conduct takes place without consent.⁶ [Oral (or) anal] sexual conduct takes place without a person's consent when that person is deemed incapable of consent.

Under our law, a person is deemed INCAPABLE OF CONSENTING to [oral (or) anal] sexual conduct when he or she is:

[NOTE: Select appropriate alternative ⁷:

³ At this point, the statutory definition continues: "by reason of some factor other than being less than seventeen years old." Penal Law § 130.40 (1). That portion of the statute has been omitted here. Instead, those factors are set forth below in the definition of the term "incapable of consent."

⁴ Penal Law § 130.00 (2)(a).

⁵ Penal Law § 130.00 (2)(b).

⁶ See Penal Law § 130.05 (1).

⁷ "Mentally disabled" and "mentally incapacitated" have been omitted here because they are also separately included in the crime of Criminal Sexual Act in the Second Degree. See Penal Law § 130.45(2). Thus, if necessary, the charge for Criminal Sexual Act in the Second Degree can be modified to charge the instant crime as applied to a person who is "mentally disabled" or "mentally incapacitated." Likewise, "physically helpless" has

committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital,⁸ and the actor is an employee⁹ who knows or reasonably should know that such person is committed to the care and custody or supervision of such department or hospital.¹⁰

or

committed to the care and custody of a local correctional facility,¹¹ and the actor is an employee,¹² not married to such person,¹³ who knows or reasonably should know that such person is committed to the care and custody of such facility.¹⁴

or

committed to or placed with the office of children and family services and in residential care, and the actor is an

been omitted here because it is also separately included in the crime of Criminal Sexual Act in the First Degree. See Penal Law § 130.50(2). Thus, if necessary, the charge for Criminal Sexual Act in the First Degree can be modified to charge the instant crime as applied to a person who is “physically helpless.

⁸ If in issue, the definition of “hospital” is set forth in Correction Law § 400(2).

⁹ If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3)(e).

¹⁰ Penal Law § 130.05(3)(e).

¹¹ If in issue, the definition of “local correctional facility” is set forth in Correction Law § 40(2).

¹² If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3)(f).

¹³ If in issue, the definition of “married” is set forth in Penal Law § 130.00(4).

¹⁴ Penal Law § 130.05 (3)(f).

employee,¹⁵ not married to such person,¹⁶ who knows or reasonably should know that such person is committed to or placed with the office of children and family services and in residential care.¹⁷

or

a client or patient and the actor is a health care provider¹⁸ or mental health care provider¹⁹ and the act of sexual conduct occurs during a treatment session, consultation, interview, or examination,²⁰ and, such conduct was not performed for a valid medical or mental health care purpose.²¹

or

a resident or inpatient of a residential facility operated, licensed or certified by (i) the office of mental health; (ii) the office for people with developmental disabilities; or (iii) the office of alcoholism and substance abuse services, and the actor is an employee²² of the facility not married to such

¹⁵ If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3) (g).

¹⁶ If in issue, the definition of “married” is set forth in Penal Law § 130.00 (4).

¹⁷ Penal Law § 130.05(3)(g).

¹⁸ If in issue, the definition of “health care provider” is set forth in Penal Law § 130.00 (12).

¹⁹ If in issue, the definition of “mental health care provider” is set forth in Penal Law § 130.00(13).

²⁰ Penal Law § 130.05(3)(h).

²¹ Penal Law § 130.10(2).

²² If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3) (i).

resident or inpatient.^{23]}

or

detained or otherwise in the custody of a police officer, [peace officer, or other law enforcement official] and the actor is a police officer, [peace officer or other law enforcement official] who either: (i) is detaining or maintaining custody of such person; or (ii) knows, or reasonably should know, that at the time of the offense, such person was detained or in custody.²⁴

[Note: in any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old; mentally disabled; a client or patient and the actor is a health care provider, detained or otherwise in custody of a law enforcement official, or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee add if in issue:

It is a defense to this charge that the defendant was married to the victim.²⁵ "Married" means the existence of the relationship between the defendant and the victim as spouses which was recognized by law at the time of the alleged commission of this crime.^{26]}

NOTE: This is the end of definitions and the resumption of the charge:

²³ Penal Law § 130.05 (3) (i). If in issue, the definition of "married" is set forth in Penal Law § 130.00 (4).

²⁴ Penal Law § 130.05(3)(j).

²⁵ See Penal Law § 130.10 4).

²⁶ See Penal Law § 130.00(4). See Domestic Relations Law §§ 15 and 15-a.

Thus, the law deems oral or anal sexual conduct with such a person to be without that person's consent, even if in fact that person did consent.

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, (both/each) of the following (two/three) elements:

1. That on or about (date), in the County of (County) the defendant (defendant's name), engaged in

Select applicable alternative(s):

oral sexual conduct [or]

anal sexual conduct

with (complainant's name); [and]

2. That (complainant's name) was incapable of consent [and]

[Add if applicable:

3. That the defendant was not married to (name of complainant).]

If you find 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 the People have not proven beyond a reasonable doubt [either one / any one or more] of those elements, you must find the defendant not guilty of this crime.

NOTE: If the affirmative defense set forth in Penal Law § 130.10 (1) or (3) applies, omit the final two paragraphs of the above charge, and substitute the applicable "additional charge" from the end of this article.