

**RAPE THIRD DEGREE  
(E Felony)  
(Defendant 21 or More;  
Complainant Less than 17)  
PENAL LAW 130.25 (2)  
(Committed on or after Nov. 1, 2003)**

The \_\_\_\_\_ count is Rape in the Third Degree.

Under our law, a person is guilty of Rape in the Third Degree, when being twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than seventeen (17) years old.

Under our law, it is also an element of this offense that the sexual intercourse was committed without the consent of that other person.<sup>1</sup> Sexual intercourse takes place without a person's consent when that person is deemed by law to be incapable of consent. Under our law, a person is deemed incapable of consenting to sexual intercourse when he or she is less than seventeen (17) years old.<sup>2</sup> Thus, the law deems sexual intercourse with such a person to be without that person's consent, even if in fact that person did consent.

It is not a defense to this charge that the actor did not know that the person with whom the actor had sexual intercourse was less than seventeen (17) years old, or that the actor believed that such person was seventeen (17) years old or more on the date of the crime.<sup>3</sup>

*[Add If Applicable:*

It is a defense to this charge that the defendant was

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<sup>1</sup> See Penal Law § 130.05 (1).

<sup>2</sup> Penal Law § 130.05 (3) (a).

<sup>3</sup> See Penal Law § 15.20 (3).

married to the victim.<sup>4</sup> “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.<sup>5</sup>]

The term, “sexual intercourse,” used in the definition of this crime has its own special meaning in our law. I will now give you the meaning of that term.

SEXUAL INTERCOURSE means any penetration, however slight, of the penis into the vaginal opening. In other words, any penetration of the penis into the vaginal opening, regardless of the distance of penetration, constitutes an act of sexual intercourse. Sexual intercourse does not necessarily require erection of the penis, emission, or orgasm.<sup>6</sup>

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/four) elements:

1. That on or about (date), in the county of (County) the defendant (defendant’s name), engaged in sexual intercourse with (complainant’s name); and,
2. That the defendant was twenty-one (21) years old or more; [and]

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<sup>4</sup> See Penal Law § 130.10 (4).

<sup>5</sup> See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.

<sup>6</sup> The statutory definition has been amplified in accord with case law (see Penal Law § 130.00 [1]; *People v Liberta*, 64 NY2d 152, 169 [1984]; *People v Williams*, 259 AD2d 509 [2d Dept 1999]; *People v White*, 185 AD2d 472 [3d Dept 1992]; *People v Berardicurti*, 167 AD2d 840 [4th Dept 1990]; *People v Edwards*, 173 AD 375 [2d Dept 1916]).

3. That (name of complainant) was less than seventeen (17) years old [and]

[Add if applicable:

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

Therefore, if you find that the People have proven beyond a reasonable doubt, each of those elements, you must find the defendant guilty of the crime of Rape in the Third Degree as charged in the \_\_\_\_\_ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Rape in the Third Degree as charged in the \_\_\_\_\_ count.