

**CRIMINAL SEXUAL ACT IN THE THIRD DEGREE
(Incapacity to Consent :
Mental Disability or Incapacity, or
Physical Helplessness)
Penal Law § 130.40(1)
(Committed on or after November 1, 2003)**

A charge for “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 [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 been omitted here because it is also separately included in the crime of Criminal Sexual Act in the First Degree [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.”