

**SEXUAL ABUSE IN THE THIRD DEGREE
(No Acquiescence)
PENAL LAW 130.55
(Committed on or after Oct. 13, 2010 ¹)**

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

Under our law, a person is guilty of Sexual Abuse in the Third Degree when he or she subjects another person to sexual contact without that person's consent.

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

SEXUAL CONTACT means any touching of the sexual or other intimate parts of a person for the purpose of gratifying the sexual desire of either party. It includes the touching of the actor by the victim as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.²

Sexual contact takes place WITHOUT A PERSON'S CONSENT when it results from any circumstances in which a person does not expressly or impliedly acquiesce in the actor's conduct.³

¹ Except for the amendment to the definition of "sexual contact," effective October 13, 2010, as explained in the footnote to that definition, this charge is effective for crimes committed on or after Nov. 1, 2003.

² Penal Law § 130.00(3), as amended by the L.2010, c. 193, effective October 13, 2010, which struck the phrase "not married to the actor" after the word "person," and added the concluding phrase "as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."

³ Penal Law § 130.05(2)(c).

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (name of defendant), subjected (name of complainant) to sexual contact; and
2. That the defendant did so without the consent of (name of complainant) in that he/she did not expressly or impliedly acquiesce to the defendant's conduct.

[NOTE: If the affirmative defense does not apply:

If you find the People have proven beyond a reasonable doubt both 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 or both of those elements, you must find the defendant not guilty of this crime.

[NOTE: If the affirmative defense applies:

Therefore, if you find that the People have not proven beyond a reasonable doubt both of those elements, you must find the defendant not guilty of Sexual Abuse in the Third Degree as charged in _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt both of the elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Sexual Abuse in the Third Degree, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of Sexual Abuse in the Third Degree that on (specify date)

(Specify)'s lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old; and

(*Specify*) was more than fourteen years old; and

The defendant was less than five years older than (*specify*).

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.

Therefore, 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 Sexual Abuse in the Third Degree, you must find the defendant guilty of that crime as charge in the _____ count.

On the other hand, 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 Sexual Abuse in the Third Degree as charged in the _____ count.