

SEXUAL ABUSE IN THE FIRST DEGREE
(Physical Helplessness)
Penal Law § 130.65 (2)
(Committed on or after Oct. 13, 2010¹)

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

Under our law, a person is guilty of Sexual Abuse in the First Degree when he or she subjects another person to sexual contact when the other person is incapable of consent by reason of being physically helpless.

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

A person is **INCAPABLE OF CONSENT** when that person is physically helpless.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, ch 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 (3) (d).

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.⁴

Under our law, sexual contact with a physically helpless person is deemed to be without that person's consent.

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

⁴ Penal Law § 130.00 (7); See *People v Teicher*, 52 NY2d 638 (1981) (Where victim responded negatively to a command to stand and was mentally aware but had no control over her body there was sufficient proof of physical helplessness); *People v Bjork*, 105 AD3d 1258 (3d Dept 2013) (“a person who is asleep or unable to communicate as a result of voluntary intoxication is considered to be physically helpless”); *P v Perkins*, 27 AD3d 890, 892 (3d Dept 2006) (“the victim’s testimony that she blacked out and ‘was so drunk [she] didn’t know what was going on,’ is sufficient to establish the element of physical helplessness”); *People v Sensourichanh*, 290 AD2d 886 (3d Dept 2002) (“it is well settled that the definition of physically helpless is broad enough to cover a sleeping victim, particularly where, as here, there is strong evidence that the victim’s sleep was drug and alcohol induced”) (internal citations omitted); *P v Himmel*, 252 AD2d 273 (3d Dept 1999) (victim’s testimony that although he was aware of what was going on, he was very intoxicated and unable to speak was sufficient to show that he was physically helpless); *People v Thiessen*, 158 AD2d 737, 740 (3d Dept 1990) (“there was proof that [the victim] was asleep and therefore helpless and unable to consent”); *People v Cirina*, 143 AD2d 763 (2d Dept 1988) (13-year-old complainant was physically helpless because of her voluntary intoxication leading to her “generally weakened condition”); *But see People v Clyburn*, 212 AD2d 1030, 1031 (4th Dept 1995) (“the fact that the victim was afflicted with Huntington’s Chorea did not render her physically helpless, i.e., ‘unconscious or for any other reason...unable to communicate unwillingness to act’”).

2. That *(name of complainant)* was incapable of consent by reason of being physically helpless.

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 set forth in Penal Law § 130.10(1) applies, omit the final two paragraphs of the above charge, and substitute the applicable charge in the “additional charges” section from the end of this article.