

**AFFIRMATIVE DEFENSE**  
**(Lack of Knowledge of Incapacity to Consent<sup>1</sup> )**  
**[Penal Law § 130.10(1)]**

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*Note: If applicable, omit the final two paragraphs of the instructions on the crime charged, and substitute the following:*

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Therefore, if you find that the People have not proven beyond a reasonable doubt (either one or both/any one or more) of those elements, you must find the defendant not guilty of (*specify*) as charged in \_\_\_\_\_ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt (both / each) of the elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of (*specify*), you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of (*specify*) that the defendant, at the time he/she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for (*specify*'s) incapacity to consent.

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 (*specify*), 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 (*specify*) as charged in the \_\_\_\_\_ count.]

1. The affirmative defense applies to any prosecution under Penal Law article 130 "in which the victim's lack of consent is based solely upon his or her incapacity to consent because he or she was mentally disabled, mentally incapacitated or physically helpless." Penal Law § 130.10(1).