

**SEXUAL ABUSE IN THE SECOND DEGREE  
(Incapacity to Consent Other Than By Age)**

**Penal Law § 130.60 (1)**

**(Committed on or after Oct. 13, 2010)<sup>1</sup>**

(Revised July 2011, Dec. 2013, July 2018)<sup>2</sup>

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

Under our law, a person is guilty of Sexual Abuse in the Second Degree when he or she subjects another person to

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<sup>1</sup> This instruction is applicable to crimes committed on or after February 1, 2001, except for:

(1) the amendment to the definition of “sexual contact,” effective October 13, 2010, as explained in the footnote to that definition; and

(2) the provision set forth in Penal Law § 130.05 (3) (i), which was added by the laws of 2012, chapter 501, effective January 16, 2013, and which is set forth in the text to which footnote 23 is appended; and

(3) for the provision set forth in Penal Law § 130.05 (3)(j), which was added by the laws of 2018, chapter 55, effective May 12, 2018, and which is set forth in the text to which footnote 23 is appended.

<sup>2</sup> The revisions were to accommodate the statutory amendments noted in footnote one.

The charge has also been revised to make uniform the instructions for article 130 sections regarding people who are incapable of consenting that include as an element that the defendant is not married to the complainant or that contain the statutory defense that the defendant was married to the complainant at the time of the alleged offense. See Penal Law §§ 130.05(3) and 130.10(4). For instances where “not married to the [complainant]” is a statutory element, that language appears in the portions of the instructions that mirror the statutory language of the appropriate subdivision, then as applicable, that element must be included in the court’s charge. For instances where marriage to the complainant is a defense, the instructions contain a note indicating the circumstances under which the defense applies; if the defense is in issue, the “not married to the [complainant]” element must be included in the court’s charge.

sexual contact and when such other person is incapable of consent.<sup>3</sup>

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.<sup>4</sup>

It is an element of this crime that the sexual contact takes place without consent.<sup>5</sup> Sexual contact 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 contact when he or she is:

*[NOTE: Select appropriate alternative:*

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<sup>3</sup> At this point, the statutory definition continues: "by reason of some factor other than being less than seventeen years old." Penal Law § 130.60 (1). That portion of the statute has been omitted here. Instead, those factors are set forth below in the definition of the term "incapable of consent."

<sup>4</sup> Penal Law § 130.00(3), as amended by the laws of 2010, chapter 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."

<sup>5</sup> Penal Law § 130.05(1).

mentally disabled.<sup>6</sup>

MENTALLY DISABLED means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.<sup>7</sup>

*or* mentally incapacitated.<sup>8</sup>

MENTALLY INCAPACITATED means that a person is rendered temporarily incapable of appraising or controlling his or her conduct owing to the influence of a narcotic or intoxicating substance administered to him or her without his or her consent or to any other act committed upon him or her without his or her consent.<sup>9</sup>

*or* physically helpless.<sup>10</sup>

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.<sup>11</sup>

*or* committed to the care and custody or supervision of the state department of corrections and community supervision

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<sup>6</sup> Penal Law § 130.05(3) (b).

<sup>7</sup> Penal Law § 130.00(5).

<sup>8</sup> Penal Law § 130.05(3) (c).

<sup>9</sup> Penal Law § 130.00(6).

<sup>10</sup> Penal Law § 130.05(3)(d).

<sup>11</sup> Penal Law § 130.00(7).

or a hospital,<sup>12</sup> and the actor is an employee<sup>13</sup> who knows or reasonably should know that such person is committed to the care and custody or supervision of such department or hospital.<sup>14</sup>

*or* committed to the care and custody of a local correctional facility,<sup>15</sup> and the actor is an employee,<sup>16</sup> not married to such person,<sup>17</sup> who knows or reasonably should know that such person is committed to the care and custody of such facility.<sup>18</sup>

*or* committed to or placed with the office of children and family services and in residential care, and the actor is an employee,<sup>19</sup> not married to such person,<sup>20</sup> who knows or reasonably should know that such person is committed to

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<sup>12</sup> If in issue, the definition of “hospital” is set forth in Correction Law § 40(2).

<sup>13</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3) (e).

<sup>14</sup> Penal Law § 130.05(3)(e).

<sup>15</sup> If in issue, the definition of “local correctional facility” is set forth in Correction Law § 40(2).

<sup>16</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05(3)(f).

<sup>17</sup> If in issue, the definition of “married” is set forth in Penal Law § 130.00(4).

<sup>18</sup> Penal Law § 130.05(3)(f).

<sup>19</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05(3)(g).

<sup>20</sup> If in issue, the definition of “married” is set forth in Penal Law § 130.00(4).

or placed with the office of children and family services and in residential care.<sup>21</sup>

*or*

a resident or inpatient of a residential facility operated, licensed or certified by (i) the office of mental health; (ii) the office for people with developmental disabilities; or (iii) the office of alcoholism and substance abuse services, and the actor is an employee<sup>22</sup> of the facility not married to such resident or inpatient.<sup>23]</sup>

*or*

detained or otherwise in the custody of a police officer, [peace officer, or other law enforcement official] and the actor is a police officer, [peace officer or other law enforcement official] who either: (i) is detaining or maintaining custody of such person; or (ii) knows, or reasonably should know, that at the time of the offense, such person was detained or in custody.<sup>24</sup>

*[Note: in any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old; mentally disabled; a client or patient and the actor is a health care provider, detained or otherwise in custody of a*

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~~<sup>21</sup> Penal Law § 130.05 (3) (g).~~

<sup>22</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05(3)(i).

<sup>23</sup> Penal Law § 130.05(3)(i). If in issue, the definition of “married” is set forth in Penal Law § 130.00(4).

<sup>24</sup> Penal Law § 130.05(3)(j).

*law enforcement official, or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee add if in issue: or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee, add if in issue:*

It is a defense to this charge that the defendant was married to the victim.<sup>25</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>26]</sup>

*NOTE: This is the end of definitions and the resumption of the charge:*

Thus, the law deems sexual contact with such a person to be without that person's consent, even if in fact that person did consent.

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, (both/each) of the following (two/three) elements:

1. That on or about (date) , in the County of (County), the defendant, (defendant's name), subjected (name of complainant) to sexual contact; and

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<sup>25</sup> See Penal Law § 130.10(4).

<sup>26</sup> See Penal Law § 130.00(4). See Domestic Relations Law §§ 15 and 15-a.

2. That (name of complainant) was incapable of consent.

*[Add if applicable:*

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

If you find the People have proven beyond a reasonable doubt [both / each] 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 / any one or more] 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.*

*NOTE: Where lack of consent results solely from incapacity to consent because of the alleged victim's mental disability or mental incapacity, a charge on corroboration is required, and that charge is in the “additional charges” section of this article. Penal Law § 130.16.*