

SODOMY THIRD DEGREE
(E Felony)
(Complainant Mentally Defective;
Mentally Incapacitated; Physically Helpless)
PENAL LAW 130.40(1)
(Committed on or after July 27, 1984)¹

The _____ count is Sodomy in the Third Degree.

Under our law, a person is guilty of Sodomy in the Third Degree when he or she engages in deviate sexual intercourse with a person who is incapable of consent by reason of being mentally defective [*or* mentally incapacitated] [*or* physically helpless].

I will now give you the meaning of the following terms used in that definition: "deviate sexual intercourse," "incapable of consent," and ["mentally defective."] ["mentally incapacitated."] ["physically helpless."]

DEVIATE SEXUAL INTERCOURSE means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.²

Under our law, a person is **INCAPABLE OF CONSENTING** to deviate sexual intercourse when that person is

[*NOTE: Select appropriate alternative:*

mentally defective.³ **MENTALLY DEFECTIVE** 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.⁴

or mentally incapacitated.⁵ **MENTALLY INCAPACITATED** means that a person is

¹*People v. Liberta*, 64 NY2d 152 (1984), decided December 20, 1984, eliminated the gender exemption for rape and sodomy. Therefore, if a female is charged as a principal, the effective date of the statute is December 20, 1984. The definition of the crime has been modified accordingly.

²For the definition of "not married," see Penal Law § 130.00(4).

³*See*, Penal Law § 130.05(3)(b).

⁴*See*, Penal Law § 130.00(5).

⁵*See*, Penal Law § 130.05(3)(c).

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).⁶

or physically helpless.⁷ **PHYSICALLY HELPLESS** means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.⁸]

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), engaged in deviate sexual intercourse with (name of complainant); and
2. That (name of complainant) was incapable of consent because he/she was mentally defective [*or* mentally incapacitated] [*or* physically helpless].

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Sodomy in the Third Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Sodomy in the Third Degree as charged in the _____ count.

⁶See, Penal Law § 130.00(6).

⁷See, Penal Law § 130.05(3)(d).

⁸See, Penal Law § 130.00(7).