

EXTREME EMOTIONAL DISTURBANCE DEFENSE

(Revised Feb. 2016 and Dec. 2019)¹

Penal Law § 125.25 (1)(a)²
Effective September 1, 1967

Penal Law § 125.26(3)(a)
Effective December 21, 2005

Penal Law § 125.27 (2)(a)
Effective September 1, 1995

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

If you find that the People have not proven beyond a reasonable doubt any one of those elements, you must find the defendant not guilty of Murder in the (*specify*) degree.

If you find that the People have proven beyond a reasonable doubt each of the elements, you must consider an affirmative defense the defendant has raised. That defense, if proved, does not relieve the defendant of responsibility for the homicide, but, under our law, it reduces the degree of the crime from Murder in the (*specify*) degree to Manslaughter in the First Degree. Remember, if you have already found the defendant not guilty of Murder in the (*specify*) degree, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to a charge of Murder in the (*specify*) degree that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. The reasonableness of that explanation or excuse is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.³

The affirmative defense of extreme emotional disturbance has three principal components.⁴

First, the defendant must have had an extreme emotional disturbance, that is, the defendant must have had an emotional disturbance so extreme as to result in and become manifest as a

profound loss of self-control.⁵

Second, there must have been an explanation or excuse for such extreme emotional disturbance that was reasonable. The reasonableness of that explanation or excuse must be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

Third, in committing the homicide, the defendant must have acted under the influence of that extreme emotional disturbance.

Your determination of the reasonableness of the explanation or excuse must be made initially by determining the situation in which the defendant found himself/herself, including the circumstances as he/she believed them to be at the time, however inaccurate that belief may have been. Then, you must determine whether, from the viewpoint of a person in that situation, the explanation or excuse was reasonable.

Remember, it is not the act of killing that must be supported by a reasonable explanation or excuse. It is the extreme emotional disturbance for which there must be a reasonable explanation or excuse.

Add if applicable:

It is not, however, a "reasonable explanation or excuse" that the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth.⁶

Under our law, the defendant has the burden of proving this 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 must consider any relevant evidence whether 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.

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 each of the elements of Murder in the (*specify*) degree, you must find the defendant guilty of Murder in the (*specify*) degree.

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 Murder in the (*specify*) degree as charged in the (*specify*) count, but you must find the defendant guilty of the reduced charge of Manslaughter in the First Degree.

1. The February, 2016 revision was for the purpose of adding language in accord with *People v McKenzie*, 19 NY3d 463 (2012). See endnote five.

The December, 2019 revision was for the purpose of including a statutory amendment of the defense that excludes a defense based upon the sexual orientation or gender of the victim [Laws of 2019, ch. 45].

2. Although the statute defines the defense as a defense to intentional murder, the Appellate Division has held that the defense applies to a charge of attempted murder (see *People v White*, 125 AD2d 932, 933 [4th Dept 1986]; *People v Tabarez*, 113 AD2d 461, 463 [2d Dept 1985] *aff'd on other grounds*, 69 NY2d 663 [1986]; *People v Lanzot*, 67 AD2d 864, 866 [1st Dept 1979], *app disp* 49 NY2d 796 [1980]). The Court of Appeals has held that the defense is not applicable to depraved indifference murder (see *People v Fardan*, 82 NY2d 638 [1993]).

3. See Penal Law § 125.25 (1) (a) and Penal Law § 125.27 (2). See also *People v Patterson*, 39 NY2d 288 [1976] *aff'd* 432 US 197 (1977) (the affirmative defense is constitutional). See generally *People v White*, 79 NY2d 900 [1992] and *People v Casassa*, 49 NY2d 668 [1980] (finding in both cases that the defendant failed to establish the affirmative defense); *People v Roche*, 98 NY2d 70 [2002] and *People v Walker*, 64 NY2d 741 (1984) (finding in both cases that the trial court properly declined to charge the affirmative defense); *People v Harris*, 95 NY2d 316 [2000], *People v Tabarez*, 69 NY2d 663 [1986] and *People v Moyer*, 66 NY2d 887 [1985] (finding in each case that the defendant was entitled to have the affirmative defense charged).

4. See *People v Roche*, 98 NY2d at 75-76; *People v Harris*, 95 NY2d at 319; *People v Casassa*, 49 NY2d 668 [1980]; and other cases cited in endnote three.

5. See *People v McKenzie*, 19 NY3d 463, 467 [2012] (holding that the term “‘mental infirmity’ . . . refers more broadly to any reasonably explicable

emotional disturbance so extreme as to result in and become manifest as a profound loss of self-control . . . [,] [and] that the subjective element of the extreme emotional disturbance defense may be inferred simply from circumstances indicative of a loss of control and, concomitantly, that it may be established without psychiatric evidence”); see also *People v Israel*, 26 NY3d 236, 239 n [2015] (“Extreme emotional disturbance is ‘a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control;’ to succeed on that defense, a defendant must prove that he or she, subjectively, was acting under the influence of such a disturbance and that, objectively, there was a reasonable explanation or excuse for that disturbance” [quoting *People v Roche*, 98 NY2d at 75]).

6. Penal Law §§ 125.25(1)(a)(ii); 125.26(3)(a)(ii); 125.27(2)(a)(ii).