

**CRIMINAL SEXUAL ACT IN THE THIRD DEGREE**  
**(Defendant 21 or More**  
**Complainant Less Than 17)**  
**Penal Law § 130.40 (2)**  
**(Committed on or after Nov. 1, 2003)**  
**(Revised December 2013)<sup>1</sup>**

The (*specify*) count is Criminal Sexual Act in the Third Degree.

Under our law, a person is guilty of Criminal Sexual Act in the Third Degree when, being twenty-one (21) years old or more, he or she engages in

*Select applicable alternative(s):*  
oral sexual conduct [or]  
anal sexual conduct

with a person who is incapable of consent by reason of being less than seventeen (17) years old.<sup>2</sup>

The following terms used in that definition have a special meaning:

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<sup>1</sup> The revision was 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.

<sup>2</sup> The definition of the crime has been modified to incorporate specifically the requirement of incapacity to consent (see Penal Law §§ 130.05 [1], [2] [b]).

*Select applicable alternative(s):*

[ORAL SEXUAL CONDUCT means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus or the mouth and the vulva or vagina.<sup>3</sup>]

[ANAL SEXUAL CONDUCT means conduct between persons consisting of contact between the penis and the anus.<sup>4</sup>]

Under our law, a person is INCAPABLE OF CONSENTING to [oral (or) anal] sexual conduct when that person is less than seventeen (17) years old.<sup>5</sup> Thus, the law deems [oral (or) anal] sexual conduct with such a person to be without that person's consent, even if in fact that person did consent.

It is not a defense to a charge of Criminal Sexual Act in the Third Degree that the actor did not know that the person with whom the actor had [oral (or) anal] sexual conduct was less than seventeen (17) years old, or that the actor believed that such person was seventeen (17) years old or more on the date of the crime.<sup>6</sup>]

*[Add If Applicable:*

It is a defense to this charge that the defendant was married to the victim.<sup>7</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

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<sup>3</sup> Penal Law § 130.00 (2) (a).

<sup>4</sup> Penal Law § 130.00 (2) (b).

<sup>5</sup> See Penal Law § 130.05 (3) (a).

<sup>6</sup> See Penal Law § 15.20 (3).

<sup>7</sup> See Penal Law § 130.10 (4).

alleged commission of this crime.<sup>8]</sup>

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, each of the following (three/four) elements:

1. That on or about (date), in the county of (County), the defendant, (name of defendant), engaged in

*Select applicable alternative(s):*

oral sexual conduct [or]

anal sexual conduct

with (name of complainant); and

2. That the defendant was twenty-one (21) years old or more at that time; and
3. That (name of complainant) was incapable of consent because he/she was less than seventeen (17) years old [and]

*[Add if applicable:*

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

If you find the People have proven beyond a reasonable doubt 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 any one or more of those elements, you must find the defendant not guilty of this crime.

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<sup>8</sup> See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.