

**SEXUAL ABUSE SECOND DEGREE**  
**(A Misdemeanor)**  
**(Complainant Mentally Defective;**  
**Mentally Incapacitated; Physically Helpless)**  
**PENAL LAW 130.60(1)**  
**(Committed on or after July 27, 1984)<sup>1</sup>**

The \_\_\_\_ 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 sexual contact and that person 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: “sexual contact,” “incapable of consent,” and [“mentally defective”] [“mentally incapacitated”] [“physically helpless”].

**SEXUAL CONTACT** means any touching of the sexual or other intimate parts of another person not married to the actor 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.<sup>2</sup>

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

[NOTE: Select appropriate alternative:

**mentally defective.**<sup>3</sup> **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.<sup>4</sup>

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<sup>1</sup>*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.

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

<sup>3</sup>*See*, Penal Law § 130.05(3)(b).

<sup>4</sup>*See*, Penal Law § 130.00(5).

*or* mentally incapacitated.<sup>5</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>6</sup>

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

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, (defendant's name), subjected (name of complainant) to sexual contact, in that he/she (specify nature of contact) for the purpose of sexual gratification; 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 Sexual Abuse in the Second 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 Sexual Abuse in the Second Degree as charged in the \_\_\_\_\_ count.

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

<sup>6</sup>See, Penal Law § 130.00(6).

<sup>7</sup>See, Penal Law § 130.05(3)(d).

<sup>8</sup>See, Penal Law § 130.00(7).