

SODOMY SECOND DEGREE
(D Felony)
(Defendant 18 or More; Complainant Less than 15)
PENAL LAW 130.45(1)
(Committed on or after
February 1, 2001)

The _____ count is Sodomy in the Second Degree.

Under our law, a person is guilty of Sodomy in the Second Degree when, being eighteen years (18) old or more, he or she engages in deviate sexual intercourse with another person less than fifteen (15) years old.

Under our law, it is also an element of this offense that the deviate sexual intercourse was committed without the consent of that other person.¹ Deviate sexual intercourse 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 deviate sexual intercourse when he or she is less than seventeen (17) years old.² Thus, deviate sexual intercourse with such a person is always deemed to be without that person's consent, even if in fact that person did consent.

It is not a defense to this charge that the actor did not know that the person with whom the actor had deviate sexual intercourse was less than fifteen (15) years old, or that the actor believed that such person was fifteen (15) years old or more on the date of the crime.³

The term, "deviate sexual intercourse," used in the definition of this crime has its own special meaning in our law. I will now give you the meaning of that term.

¹ See Penal Law § 130.05(1).

² Penal Law § 130.05(3)(a).

³ See Penal Law §15.20(3).

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.⁴

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, each of the following three elements:

1. That on or about (*date*), in the county of (*county*) the defendant (*defendant's name*), engaged in deviate sexual intercourse with (*complainant's name*); and,
2. That the defendant was eighteen years old or more; and,
3. That (*complainant's name*) was less than fifteen (15) years old.

[NOTE: If the affirmative defense does not apply, conclude as follows:

Therefore, if you find that the People have proven beyond a reasonable doubt, each of those elements, you must find the defendant guilty of the crime of Sodomy 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 any one or more of those elements, you must find the defendant not guilty of the crime of Sodomy in the Second Degree as charged in the _____ count.]

[NOTE: If the affirmative defense does apply continue as

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

follows:

If you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Sodomy in the Second Degree as charged in the _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Sodomy in the Second Degree you will not consider the affirmative defense.

Under our law, it is an affirmative defense to a prosecution for this crime that the defendant was less than four (4) years older than the complainant at the time of the act.

Under our law, the defendant has the burden of proving an 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 may consider the evidence presented 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 the 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.

Therefore, 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 have proven

beyond a reasonable doubt the elements of Sodomy in the Second degree, you must find the defendant guilty of that crime as charged in the _____ count.

On the other hand, 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 the crime of Sodomy in the Second Degree as charged in the _____ count.]