

**CONSPIRACY IN THE FIFTH DEGREE**  
**(Conspiracy to commit a crime**  
**with a person less than 16 years of age)**  
**Penal Law § 105.05(2)**  
**(Committed on or after Sept. 1, 1978)**

Revised July 2018<sup>1</sup>

The (specify) count is Conspiracy in the Fifth Degree.<sup>2</sup>

Under our law, a person is guilty of Conspiracy in the Fifth Degree when, with intent that conduct constituting a crime be performed, he or she, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

Under our law, (specify the object crime) is a crime. A person is guilty of (specify the object crime), when (read the applicable portion of the statutory definition of the object crime).

*NOTE: If the object crime has been separately charged, the jury should be instructed on that count first and that instruction should be cross-referenced here. If it has not been separately charged, then here read the statutory definition of the applicable crime and any necessary defined terms as set forth in CJI2d for that offense.*

Knowledge of a conspiracy does not by itself make the defendant a coconspirator.<sup>3</sup> The defendant must intend that conduct constituting a crime be performed. INTENT means conscious objective or purpose.<sup>4</sup> Thus, a person acts with the

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<sup>1</sup> The August 2018 revision was for the purpose of inserting the text to footnotes 3 and 5.

<sup>2</sup>This charge contemplates a single integrated conspiracy. Whenever the possibility of more than one conspiracy is supported by a reasonable view of the evidence, the jury must be charged in accordance with the law as set forth in *People v. Leisner*, 73 N.Y.2d 140 (1989).

<sup>3</sup> *People v. Reyes*, 31 N.Y.3d 930, 931 (2018)

<sup>4</sup> See Penal Law § 15.05(1). If necessary, an expanded definition of “intent” is available in the section on Instructions of General Applicability

intent that conduct constituting a crime be performed when his or her conscious objective or purpose is that such conduct be performed.

*[Add when appropriate:*

Evidence that a defendant was present when others agreed to engage in the performance of a crime does not by itself show that the defendant personally agreed to engage in the conspiracy.<sup>5]</sup>

Under our law, the People must also prove that one of the conspirators committed an overt act in furtherance of the conspiracy.<sup>6</sup> The agreement to engage in or cause the performance of a crime is not itself an overt act. The overt act must be an independent act that tends to carry out the conspiracy. The overt act can be, but need not be, the commission of the crime that was the object of the conspiracy.<sup>7</sup>

In this case, the alleged overt act[s] is [are]: *(specify)*.

*[Note: Add when and to the extent appropriate:*

Under our law, it is no defense to a prosecution for conspiracy that, owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the agreement or the object conduct or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of conspiracy or the object crime, one or more of the defendant's co-conspirators could not be guilty of conspiracy or the object crime.<sup>8</sup> In other words, a defendant may be convicted of conspiracy even though one or more or all of the other parties to the agreement are not guilty of conspiracy or

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under Culpable Mental States.

<sup>5</sup> *People v. Reyes*, 31 N.Y.3d 930, 931 (2018).

<sup>6</sup> See Penal Law § 105.20.

<sup>7</sup> See *People v. Ribowsky*, 77 N.Y.2d 284 (1991).

<sup>8</sup> Penal Law § 105.30.

(specify the object crime).<sup>9]</sup>

Under our law, it is not an element of this crime that the defendant knew the age of the person[s] with whom the agreement was made. Thus, it is not a defense to a prosecution for this crime that the defendant did not know that [one of] the person[s] with whom the agreement was made was [were] under 16 years of age, or believed that [all of] the person[s] with whom the agreement was made was [were] 16 years of age or more.<sup>10</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, each of the following three elements:

1. That on or about     (date)    , in the County of     (county)    ,<sup>11</sup> the defendant, (defendant's name), was over eighteen years of age, and agreed with one or more persons under sixteen years of age to engage in or cause the performance of conduct constituting the crime of (specify object crime);
2. That the defendant did so with the intent that such conduct be performed; and
3. That the defendant, or one of the persons with whom he/she agreed to engage in or cause the performance of such conduct, committed [the] [at

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<sup>9</sup>See *People v. Berkowitz*, 50 N.Y.2d 333 (1980). In an appropriate case, the Court may add the reason one or more of the parties to the agreement is not liable by charging for example, "because that party is a police officer or an agent of a police officer pretending to agree to engage in or cause the performance of the (specify object crime)"; or, "because that party is under sixteen years of age."

<sup>10</sup>See Penal Law § 15.20(3).

<sup>11</sup> If venue depends upon the place of the commission of an overt act rather than the situs of the agreement, refer to the county in the third element rather than in the first element. See Penal Law § 105.25(1).

least one] alleged overt act in furtherance of the conspiracy.

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.