AGENDA

SUPREME COURT'S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, February 5, 2014
12:00 p.m. to 1:30 p.m.
Judicial Council Room

1.	Welcome and Approval of Minutes (Tab 1)	Judge Denise Lindberg
2.	Sexual Offense Instructions from CR 1613 (Tab 2)	Committee
3.	Sexual Offense Definitions (Tab 3)	Committee
4.	Other Business	
5.	Adjourn	

Tab 1

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, December 4, 2013
12:00 p.m. to 2:00 p.m.
Judicial Council Room

PRESENT	EXCUSED
Judge Denise Lindberg, Chair	Judge Brendan McCullagh
Professor Jensie Anderson	John West
Professor Jennifer Andrus	Judge Michael Westfall
Judge James Blanch	Scott Young
Mark Field	
Sandi Johnson	
Linda Jones	
Karen Klucznik	
Thomas Pedersen, Intern	

1. Welcome and Approval of Minutes **Judge Denise Lindberg**

Judge Lindberg welcomed everyone to the meeting. *Ms. Johnson moved to approve the minutes from the previous meeting. Ms. Andrus seconded the motion and it passed unanimously.*

2. Mens Rea Committee Notes **Judge Denise Lindberg**

Judge Lindberg discussed the mens rea committee notes that have previously been approved. She stated that Ms. Adams-Perlac agreed to put them together and circulate them to the committee. She stated that she thinks the committee notes are correct. The committee reviewed the notes.

Ms. Johnson stated that she did not remember examples of the crimes being used in the committee note, e.g. murder in 302B. Ms. Klucznik agreed. Ms. Jones stated that the language used was in the previously published committee note. Ms. Jones stated that perhaps is should refer to "intentional murder" instead of just "murder". Ms. Johnson stated that the note contains references to the statute, so reading them together she would leave it as written.

The committee approved the committee notes to instructions CR 302A, CR 302B, CR 302C, CR 303A, CR CR 303B, CR 303C, CR 304A, CR 304B, and CR 304C as written.

3. Sexual Offense Instructions **Committee**

The committee reviewed the sexual offense instructions. The committee discussed making minor changes to capitalization in the title of the instructions and name of the crime within the

instructions. Ms. Klucznik recommended changing "one or more" to "each and every" as the committee previously agreed in CR 1606. The committee agreed that "one or more" should be changed to "each and every" on the NOT GUILTY portion of each instruction as it is on the GUILTY portion.

Ms. Johnson suggested flipping element 2 and element 3 in CR 1612, so that "intentionally, knowingly, or recklessly" comes before "with the intent to".

The instructions previously approved stand approved changing "one or more of the elements" to "each and every element" language and flipping element 2 and element 3 in CR 1612.

Ms. Jones suggested breaking down the first bullet on the Aggravated Sexual Abuse of a Child special verdict form into multiple bullets. Ms. Klucznik agreed. Ms. Jones suggested have a separate elements instruction for Aggravated Sexual Abuse of a Child. Ms. Klucznik stated that the special verdict form makes a cleaner record on appeal. Ms. Jones stated that it is confusing if the charge is aggravated, unless the aggravating factor is an element in the elements instruction. Ms. Jones stated that there is a difference between aggravated crimes, and an enhancement. Ms. Klucznik stated that Aggravated Murder is an exception. Judge Blanch stated that a special verdict form instructs on a lesser included offense. Ms. Klucznik stated that defense attorneys have the right to decide whether they want to charge lesser included offenses. Ms. Jones stated that putting it in a special verdict form makes it confusing, because it is not an enhancement. Ms. Johnson stated that it is an enhancement. Ms. Jones stated that aggravated sexual abuse of a child is a higher charge. Ms. Jones stated that there are two statutes, Sexual Abuse of a Child, and Aggravated Sexual Abuse of a Child. Ms. Klucznik stated that she has never seen Aggravated Sexual Abuse of a Child as an enhancement. Mr. Field and Ms. Anderson agreed. Ms. Jones stated that a special verdict form does not communicate a lesser included offense to the jury. Ms. Johnson disagrees that Sexual Abuse of a Child is a lesser included offense of Aggravated Sexual Abuse of a Child.

Ms. Jones stated that the State will typically charge Aggravated Sexual Abuse of a Child, so there should be an elements instruction. She said that if there is a case where Sexual Abuse of a Child is being charged as a lesser included offense, then a special verdict form might be necessary. Ms. Klucznik agreed and stated that it makes the record cleaner. Ms. Jones stated that the special verdict form makes sense if there are multiple possible aggravating circumstances.

Ms. Jones moved to include an elements instruction for Sexual Abuse of a Child and Aggravated Sexual Abuse of a Child, and include a special verdict form on Aggravated Sexual Abuse of a Child. Ms. Adams-Perlac will draft a proposed Aggravated Sexual Abuse of a Child instruction for review at the next meeting. Ms. Klucznik and Ms. Johnson will research whether the issue to determine whether a special verdict form or an instructions form is needed for Aggravated Sexual Abuse of a Child.

The committee discussed Aggravated Sexual Assault. Ms. Jones stated that there is no Sexual Assault statute, and it is unnecessary as stated under *State v. Rudolph*.

Ms. Adams-Perlac will draft an instruction on Aggravated Sexual Assault for review at the next meeting.

Ms. Jones stated that there is still no opinion in the consent case. Ms. Klucznik questioned whether we need to include that a specific definitions only applies for crimes committed after a certain date (since a previous statute might apply to an older offense). The committee determined that it should focus on new statutes and trust attorneys to do their job when an older statute applies.

4. Sexual Offense Definitions **Sandi Johnson**

The committee reviewed the sexual offense definitions. Ms. Jones stated these definitions are proposed to be a jury instruction. Ms. Jones asked whether a definition for age is necessary and Ms. Johnson stated that it probably is not. Ms. Jones stated that there is a case that states when the

legislature defines terms those are words with special meanings. She stated that there is case law that when the terms are not defined, you can assume that the jury understands it and will use its ordinary meaning. Ms. Jones is concerned that by defining terms that are not already defined in statute, we are putting them into a box.

Ms. Klucznik stated all we need to determine is which definitions are terms of art. She stated that words like "breast" do not need to be included. However, if there is a definition by statute or by case law, they need be included. The committee determined to remove any that do not have a definition provided by statute or case law.

The committee deleted the age, anus, and breast definitions. The committee limited the definition of "buttocks" "does not include the anus." The committee deleted the definitions of child.

Ms. Jones discussed "indecent liberties." Ms. Jones provided a new definition of indecent liberties as follows:

> "Indecent liberties" is an act of the same magnitude of gravity as [the act specifically described in the statute]. To determine whether Defendant's conduct is of equal gravity to [the act described in the statute], consider the totality of the facts and all the surrounding circumstances, including the following factors: (1) the nature of the victim's participation (whether defendant required the victim's active participation), (2) the duration of the defendant's act, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim. If after considering all the surrounding circumstances, the conduct is comparable to [the touching that is specifically prohibited], the act qualifies as indecent liberties. *State ex rel. J.L.S.*, 610 P.2d 1294, 1296 (Utah 1980), *State v. Bishop*, 753 P.2d 439 (Utah 1988), *State v. Balfour*, 2008 UT App 410, ¶ 15, 198 P.3d 471.

Ms. Johnson stated that she thinks "genitals" need to be defined. Ms. Jones stated that she agrees and that there is case law defining "genitals".

Ms. Klucznik and Ms. Jones will find the case and provide it to the committee for the next meeting.

Ms. Klucznik stated that she did not think "sexual intercourse" should be defined. She also stated that "substantial emotional or bodily pain" is a jury question. The committee removed those two definitions. The committee deleted the general definition of "touching", and referred the reader to touching as defined in each offense. The committee discussed touching and determined that the way it is outlined in each offense is helpful.

Ms. Johnson moved to delete the definitions as indicated above. She stated that penetration and touching need have individual definitions for each of the statutes. Ms. Jones stated that there will be an instruction for each definition, with a committee note if necessary. Ms. Andrus stated that it is common to have definitions together at the end of a document.

Judge Blanch stated that Utah Code section 76-1-601 has many definitions that may need to be included. He stated if we are defining things generally in the future, we need to include all of those definitions, including omission, etc.

5. Other Business

There was no other business discussed at the meeting.

6. Adjourn

The meeting was adjourned at 1:29 p.m. The next meeting will be held on Wednesday, February 5, 2014 at 12:00 p.m.

Tab 2

CR1603 Sexual Abuse of a Minor. Approved 11062013. (Reading Level 11)

(DEFENDANT'S NAME) is charged [in Count __] with committing Sexual Abuse of a Minor [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly:
    a. [touched the anus, buttocks, or any part of the genitals of (MINOR'S INITIALS)];
    b. [touched the breast of (MINOR'S INITIALS), a female];
    c. [otherwise took indecent liberties with (MINOR'S INITIALS)]; or
    d. [caused (MINOR'S INITIALS) to take indecent liberties with any person];
3. With the intent [to arouse or gratify the sexual desire of any person] [to cause substantial emotional or bodily pain to any person];
4. (MINOR'S INITIALS) was 14 or 15 years old at the time of the offense; and
5. (DEFENDANT'S NAME) was seven or more years older than (MINOR'S INITIALS).

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-401.1.

CR1604 Unlawful Sexual Activity with a Minor. Revision Approved 11062013. (Reading Level 11)

(DEFENDANT'S NAME) is charged [in Count _____] with committing Unlawful Sexual Activity with a Minor [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt all of the elements in one or more of the following variations:

VARIATION A:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly had sexual intercourse;
3. With (MINOR'S INITIALS); and
4. (MINOR'S INITIALS) was 14 or 15 years old at the time of the act.

[OR]

VARIATION B:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly engaged in any sexual act with (MINOR'S INITIALS) involving the genitals of one person and the mouth or anus of another; and
3. (MINOR'S INITIALS) was 14 or 15 years old at the time of the act.

[OR]

VARIATION C:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly caused the penetration, however slight, of the genital or anal opening of (MINOR'S INITIALS) by any foreign object, substance, instrument, or device, including a part of the human body;
3. With the intent [to arouse or gratify the sexual desire of any person] [to cause substantial emotional or bodily pain to any person]; and
4. (MINOR'S INITIALS) was 14 or 15 years old at the time of the act.

After you carefully consider all the evidence in this case, if you are convinced that each and every element [of one or more of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element [of at least one of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-401.

Committee Notes

CR 1605 Unlawful Sexual Conduct with a 16 or 17 year old. Approved 11062013. (Reading Level 12)

(DEFENDANT'S NAME) is charged [in Count ___] with committing Unlawful Sexual Conduct with a 16 or 17 year old [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly:
    a. [had sexual intercourse with (MINOR'S INITIALS)]; or
    b. [engaged in any sexual act with (MINOR'S INITIALS) involving the genitals of one person and the mouth or anus of another person]; or
    c. [caused the penetration, however slight, of the genital or anal opening of (MINOR'S INITIALS) by any foreign object, substance, instrument, or device, including a part of the human body;
        i. [with the intent to arouse or gratify the sexual desire of any person]; or
        ii. [with the intent to cause substantial emotional or bodily pain to any person]]; or
    d. [touched the anus, buttocks, or any part of (MINOR'S INITIALS)'s genitals or touched (MINOR'S INITIALS)'s breast, or otherwise took indecent liberties with (MINOR'S INITIALS), or caused (MINOR'S INITIALS) to take indecent liberties with the defendant or another person;
        i. [with the intent to arouse or gratify the sexual desire of any person]; or
        ii. [with the intent to arouse or gratify the sexual desire of any person]].
3. At the time of the sexual conduct (MINOR'S INITIALS) was 16 or 17 years old; and
4. At the time of the sexual conduct, (DEFENDANT'S NAME) was:
    a. [seven or more but less than ten years older than (MINOR'S INITIALS), and (DEFENDANT'S NAME) knew or reasonably should have known (MINOR'S INITIALS)'s age]; or
    b. [ten or more years older than (MINOR'S INITIALS)].

After you carefully consider all the evidence in this case, if you are convinced that each and every element [of one or more of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element [of at least one of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-401.2.

Committee Notes: If the State intends to rely on Subsection 2d in combination with 2a, 2b, or 2c, use the Unlawful Sexual Conduct with a 16 or 17 year old special verdict form.

CR SVF Unlawful Sexual Conduct with a 16 or 17 year old. (special verdict form). Approved 11062013. (Reading Level 34)

[LOCATION] JUDICIAL DISTRICT COURT, [IF APPLICABLE] DEPARTMENT,

IN AND FOR [COUNTY] COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- (DEFENDANT'S NAME) Defendant.	: : : : : :	**SPECIAL VERDICT** Count (#) Case No. (**)

We, the jury, having found the defendant, (DEFENDANT'S NAME), guilty of Unlawful Sexual Conduct with a 16 or 17 Year Old, [as charged in Count ____], unanimously find beyond a reasonable doubt (check all that apply):

☐ The defendant had sexual intercourse with (MINOR'S INITIALS);

☐ The defendant engaged in any sexual act with (MINOR'S INITIALS) involving the genitals of one person and the mouth or anus of another person;

☐ With the intent to arouse or gratify the sexual desire of any person, or with the intent to cause substantial emotional or bodily pain to any person, the defendant caused the penetration, however slight, of (MINOR'S INITIALS)'s genital or anal opening by any foreign object, substance, instrument, or device, including a part of the human body;

☐ With the intent to arouse or gratify the sexual desire of any person, or with the intent to cause substantial emotional or bodily pain to any person, the defendant touched the anus, buttocks, or any part of (MINOR'S INITIALS) genitals, or touched (MINOR'S INITIALS)'s breast, or otherwise took indecent liberties with

(MINOR'S INITIALS), or caused (MINOR'S INITIALS) to take indecent liberties with the defendant or another person, regardless of the sex of any participant.

DATED this _____ day of (MONTH), 20**(**)**.

_____
Foreperson

CR 1606 Rape. Approved 11062013. (Reading Level 10)

(DEFENDANT'S NAME) is charged [in Count__] with committing Rape [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
3. Had sexual intercourse with (VICTIM'S NAME);
4. Without (VICTIM'S NAME)'s consent.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-402.

Committee Notes
See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

CR 1607 Rape of a Child. Approved. 12042013 (Reading Level 10.8)

(DEFENDANT'S NAME) is charged [in Count__] with committing Rape of a Child [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
    a. had sexual intercourse with (MINOR'S INITIALS); and
    b. did so intentionally, knowingly, or recklessly; and
2. (MINOR'S INITIALS) was under 14 years old at the time of the offense.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-402.1.
State v. Martinez, 2002 UT 60.
State v. Martinez, 2000 UT App 320.

Committee Notes
See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

CR 1608 Object Rape. Approved 12042013 (Reading Level 10.6)
(DEFENDANT'S NAME) is charged [in Count ___] with committing Object Rape [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
    a. caused the penetration, however slight;
    b. of ([VICTIM'S NAME][MINOR'S INITIALS])'s genital or anal opening;
    c. by any object or substance other than the mouth or genitals;
3. With the intent to:
    a. cause substantial emotional or bodily pain to ([VICTIM'S NAME] [MINOR'S INITIALS]); or
    b. arouse or gratify the sexual desire of any person; and
4. Without ([VICTIM'S NAME] [MINOR'S INITIALS])'s consent.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-402.2.

Committee Notes
See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

CR 1609 Object Rape of a Child. Approved 12042013 (Reading Level 11.1)

(DEFENDANT'S NAME) is charged [in Count ___] with committing Object Rape of a Child [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly:
    a. caused the penetration, however slight;
    b. of (MINOR'S INITIALS)'s genital or anal opening;
    c. by any foreign object, substance, instrument or device that is not a part of the human body;
3. With the intent to:
    a. cause substantial emotional or bodily pain to (MINOR'S INITIALS); or
    b. arouse or gratify the sexual desire of any person; and
4. (MINOR'S INITIALS) was 13 years old or younger at the time of the conduct.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-402.3.
State v. Martinez, 2002 UT 60.
State v. Martinez, 2000 UT App 320.

Committee Notes
See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

CR 1610 Forcible Sodomy. Approved. (Reading Level 11)

(DEFENDANT'S NAME) is charged [in Count ___] with committing Forcible Sodomy [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
3. Committed a sexual act involving the genitals of one person and the mouth or anus of another;
4. Without ([VICTIM'S NAME] [MINOR'S INITIALS])'s consent.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-403.

Committee Notes
See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

CR 1611 Sodomy on a Child. Approved. (Reading Level 11.3)

(DEFENDANT'S NAME) is charged [in Count ___] with committing Sodomy on a Child [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
   a. committed a sexual act with (MINOR'S INITIALS), involving the genitals of one person and the mouth or anus of another; and
   b. did so intentionally, knowingly, or recklessly; and
2. (MINOR'S INITIALS) was under 14 years old at the time of the offense.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-403.1.
State v. Martinez, 2002 UT 60.
State v. Martinez, 2000 UT App 320.

Committee Notes
See Special Verdict Form for Prior Conviction or Serious Bodily Injury.

CR 1612 Forcible Sexual Abuse. Approved 12042013. (Reading Level 9.8)

(DEFENDANT'S NAME) is charged [in Count__] with committing Forcible Sexual Abuse [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly:
    a. touched the anus, buttocks, or genitals of ([VICTIM'S NAME] [MINOR'S INITIALS]);
    b. touched the breast of ([FEMALE VICTIM'S NAME] [FEMALE MINOR'S INITIALS]);
    c. took indecent liberties with ([VICTIM'S NAME] [MINOR'S INITIALS]); or
    d. caused a person to take indecent liberties with (DEFENDANT'S NAME) or another;
3. With the intent to:
    a. cause substantial emotional or bodily pain to any person, or
    b. arouse or gratify the sexual desire of any person;
4. Without consent of ([VICTIM'S NAME] [MINOR'S INITIALS]).
5. ([VICTIM'S NAME] [MINOR'S INITIALS]) was 14 years old or older at the time of the offense.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-404.

Committee Notes
See Special Verdict Form for Serious Bodily Injury or Prior Conviction.

CR 1613 Sexual Abuse of a Child. (Reading Level 11.1)

(DEFENDANT'S NAME) is charged [in Count__] with committing Sexual Abuse of a

Child [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly:
    a. Touched the anus, buttocks, or genitalia of (MINOR'S INITIALS); or
    b. Touched (MINOR'S INITIALS)'s breast; or
    c. Took indecent liberties with (MINOR'S INITIALS); or
    d. Caused (MINOR'S INITIALS) to take indecent liberties with (DEFENDANT'S NAME) or another; and
3. Did so with the intent to:
    a. Cause substantial emotional or bodily pain to any person; or
    b. Arouse or gratify the sexual desire of any person; and
4. (MINOR'S INITIALS) was under 14 years old at the time of the offense.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-404.1.
State v. Martinez, 2002 UT 60.
State v. Martinez, 2000 UT App 320.

CR 1614 Aggravated Sexual Abuse of a Child. (Reading Level 13.3)

(DEFENDANT'S NAME) is charged [in Count__] with committing Sexual Abuse of a Child [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly:
    a. touched the anus, buttocks, or genitalia of (MINOR'S INITIALS); or
    b. touched (MINOR'S INITIALS)'s breast; or
    c. took indecent liberties with (MINOR'S INITIALS); or
    d. caused (MINOR'S INITIALS) to take indecent liberties with (DEFENDANT'S NAME) or another; and
3. Did so with the intent to:
    a. cause substantial emotional or bodily pain to any person; or

   b. arouse or gratify the sexual desire of any person; and
4. (MINOR'S INITIALS) was under 14 years old at the time of the offense; and
5. In conjunction with the above offense:
   a. the offense was committed by the use of a dangerous weapon, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnapping;
   b. (DEFENDANT'S NAME) caused bodily injury or severe psychological injury to (MINOR'S INITIALS) during or as a result of the offense;
   c. (DEFENDANT'S NAME) was a stranger to (MINOR'S INITIALS) or made friends with (MINOR'S INITIALS) for the purpose of committing the offense;
   d. (DEFENDANT'S NAME) used, showed, or displayed pornography or caused (MINOR'S INITIALS) to be photographed in a lewd condition during the course of the offense;
   e. (DEFENDANT'S NAME), prior to sentencing for this offense, was previously convicted of any felony, or of a misdemeanor involving a sexual offense;
   f. (DEFENDANT'S NAME) committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct;
   g. (DEFENDANT'S NAME) committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense;
   h. (DEFENDANT'S NAME) occupied a position of special trust in relation to (MINOR'S INITIALS); "position of special trust" means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over (MINOR'S INITIALS), and includes, but is not limited to, a youth leader or recreational leader who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, babysitter, adult scout leader, natural parent, stepparent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent;
   i. (DEFENDANT'S NAME) encouraged, aided, allowed, or benefitted from acts of prostitution or sexual acts by (MINOR'S INITIALS) with any other person, or sexual performance by (MINOR'S INITIALS) before any other person, human trafficking, or human smuggling; or
   j. (DEFENDANT'S NAME) caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-404.1.
State v. Martinez, 2002 UT 60.
State v. Martinez, 2000 UT App 320.

CR SVF Aggravated Sexual Abuse of a Child. (Reading Level 25.7)

[LOCATION] JUDICIAL DISTRICT COURT, [IF APPLICABLE] DEPARTMENT,

IN AND FOR [COUNTY] COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- (DEFENDANT'S NAME), Defendant.	: : : : : :	**SPECIAL VERDICT** Count (#) Case No. (**)

We, the jury, having found the defendant, (DEFENDANT'S NAME), guilty of Aggravated Sexual Abuse of a Child, [as charged in Count ____], unanimously find beyond a reasonable doubt (check all that apply):

- ☐ The offense was committed by the use of a dangerous weapon or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnaping;
- ☐ The defendant caused bodily injury or severe psychological injury to the victim during or as a result of the offense;
- ☐ The defendant was a stranger to the victim or made friends with the victim for the purpose of committing the offense;
- ☐ The defendant used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition during the course of the offense;
- ☐ The defendant, prior to sentencing for this offense, was previously convicted of any felony, or of a misdemeanor involving a sexual offense;
- ☐ The defendant committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct;

☐ The defendant committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense;

☐ The defendant encouraged, aided, allowed, or benefitted from acts of prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person;

☐ The defendant caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth;

☐ The defendant occupied a position of special trust in relation to the victim; "position of special trust" means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, a youth leader or recreational leader who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, baby-sitter, adult scout leader, natural parent, stepparent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

References
Utah Code § 76-5-404.1

CR 1615 Aggravated Sexual Assault. (See statute listed below)

76-5-405. Aggravated sexual assault -- Penalty.

(1) A person commits aggravated sexual assault if:

(a) in the course of a rape, object rape, forcible sodomy, or forcible sexual abuse, the actor:

(i) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section **76-1-601**;

(ii) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iii) is aided or abetted by one or more persons;

(b) in the course of an attempted rape, attempted object rape, or attempted forcible sodomy, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section **76-1-601**;

(iii) attempts to compel the victim to submit to rape, object rape, or forcible sodomy, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons; or

(c) in the course of an attempted forcible sexual abuse, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section **76-1-601**;

(iii) attempts to compel the victim to submit to forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons.

CR SVF Aggravated sexual assault.

CR 1616 Consent. TABLED UNTIL A DECISION IS ISSUED IN LINDA'S CASE THOMPSON -

CR 1617 Penetration or touching sufficient to constitute offense. (Reading Level 22)

[Any sexual penetration, however slight, is enough to establish the relevant element of the offense for [Unlawful Sexual Activity with a Minor, involving sexual intercourse] [Unlawful Sexual Conduct with a 16 or 17 year old, involving sexual intercourse] [Rape].]

[Any touching, however slight, is enough to establish the relevant element of the offense for [Unlawful Sexual Activity with a Minor, involving sodomy] [Unlawful Sexual Conduct with a 16 or 17 year old, involving sodomy] [Forcible Sodomy] [Rape of a Child] [Rape].]

Any touching, even if it is over clothing, is enough to establish the relevant element of the offense for [Sodomy on a Child] [Sexual Abuse of a Child] [Aggravated Sexual Abuse of a Child].

References
Utah Code § 76-5-402.1.

State v. Martinez, 2002 UT 60.
State v. Martinez, 2000 UT App 320.

Committee Notes
Use this instruction with the relevant instruction for Unlawful Sexual Activity with a Minor, Unlawful Sexual Conduct with a 16 or 17 year old, Rape, Forcible Sodomy, Rape of a Child, Sexual Abuse of a Child, or Aggravated Sexual Abuse of a Child.

Add notes to applicable instructions.

CR 1618 Custodial sexual relations.

CR 1619 Custodial sexual misconduct.

CR 1620 Custodial sexual relations or misconduct with youth receiving state services.

CR SVF Prior Conviction

CR SVF Serious Bodily Injury

Tab 3

Generals:

- "Bodily injury" means physical pain, illness, or impairment of physical condition (Utah Code § 76-1-601)
- "Buttocks" does not include the "anus." State v. Pullman, 2013 UT App 168 ¶16.
- "Dangerous weapon" means any item capable of causing death or serious bodily injury or a facsimile or representation of the item if (i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or (ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item. (Utah Code § 76-1-601)
- "Genitals" includes the female breast." ~~means the reproductive organs. On the female, this includes the vagina, clitoris, and vulva, but does not include the breast. On a male, this includes the testes and penis.~~ State v. Couch, 635 P.2d 89 (Utah 1981)
- "Grievous sexual offense" means (a) rape, Section 76-5-402; (b) rape of a child, Section 76-5-402.1; (c) object rape, Section 76-5-402.2; (d) object rape of a child, Section 76-5-402.3; (e) forcible sodomy, Subsection 76-5-403(2); (f) sodomy on a child, Section 76-5-403.1; (g) aggravated sexual abuse of a child, Subsection 76-5-404.1(4); (h) aggravated sexual assault, Section 76-5-405; (i) any felony attempt to commit an offense described in Subsections (6)(a) through (h); or (j) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (6)(a) through (i).
- "Indecent liberties" is an act of the same magnitude of gravity as [the act specifically described in the statute]. To determine whether Defendant's conduct is of equal gravity to [the act described in the statute], consider the totality of the facts and all the surrounding circumstances, including the following factors: (1) the nature of the victim's participation (whether defendant required the victim's active participation), (2) the duration of the defendant's act, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim. If after considering all the surrounding circumstances, the conduct is comparable to [the touching that is specifically prohibited], the act qualifies as indecent liberties. *State ex rel. J.L.S.*, 610 P.2d 1294, 1296 (Utah 1980), *State v. Balfour*, 2008 UT App 410, ¶ 15, 198 P.3d 471.
- "Penetration", however slight, means touching beyond the outer folds of the female's labia. Utah Code § 76-5-407. *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988) and *State v. Kelly*, 770 P.2d 98, 99 (Utah 1988).

Committee Note

"Penetration" as defined applies only to cases involving adult defendants.

- "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.
- "Touching" (see specific statute to determine type of touch, i.e. skin to skin, however slight, etc.)

Crime Specific Definitions

76-5-401 Unlawful Sexual Activity with a Minor

- Sexual Intercourse (Requires penetration)
  - Any sexual penetration, however slight, is sufficient (76-5-407)
- Touching
  - Any touching, however slight, is sufficient (76-5-407) if the sexual act involved the genitals of one person and the mouth or anus of another person (76-5-407)
  - Requires contact with the victim's skin
- Minor
  - For purposes of this section "minor" is a person who is 14 years of age or older, but younger than 16 years of age. (76-5-401 (1))

76-5-401.1 Sexual Abuse of a Minor

- No specific definitions
- Touching requires contact with the victim's skin
- Minor
  - Same as for 76-5-401

76-5-401.2 Unlawful Sexual Conduct with a 16 or 17 Year Old

- Sexual intercourse (requires penetration)
  - Any sexual penetration, however slight, is sufficient (76-5-407)
- Touching
  - Any touching, however slight, is sufficient (76-5-407) if the sexual act involved the genitals of one person and the mouth or anus of another person (76-5-407)
  - Touching requires contact with the victim's skin
- Minor

  - As used in this section, "minor" means a person who is 16 years of age or older, but younger than 18 years of age. (76-5-401.2 (1))

76-5-402 Rape

- Sexual intercourse (requires penetration)
  - Any sexual penetration, however slight, is sufficient (76-5-407)

76-5-402.1 Rape of a Child

- Sexual intercourse (Does NOT require penetration)
- "Touching" however slight is sufficient (76-5-407) Does not require penetration. State v. Simmons, 759 P.2d 1152 (Utah 1988)(?)
- Touching requires contact with the victim's skin
- In any prosecution for rape of a child, any touching, however slight, is sufficient to constitute the relevant element of the offense. Utah law does not require penetration of the genitals with a penis as a necessary element of the offense of rape of a child. Touching the genitals with a penis, alone, is sufficient to constitute the necessary element of the offense of rape of a child.
- "Sexual Intercourse" as that term is used in these instructions means any touching of the female's genitals by the actor's penis, no matter however slight.

76-5-402.2 Object Rape

- Foreign object, substance, instrument, or device

76-5-402.3 Object Rape of a Child

- Penetration
  - Any sexual penetration, however slight, is sufficient (76-5-407)
- Touching
  - Any touching, however slight, is sufficient (76-5-407)
  - Touching requires contact with the victim's skin
  - In any prosecution for object rape of a child, any touching, however slight, is sufficient to constitute the relevant element of the offense. Utah law does not require penetration of the genitals or anal opening with any foreign object, substance, instrument, or device as a necessary element of the offense of object rape of a child. Touching of the genitals or anal opening, alone, with any foreign object, substance, instrument, or device is sufficient to constitute the necessary element of the offense of object rape of a child.
- Foreign object, substance, instrument, or device

76-5-403 Sodomy/Forcible Sodomy

- Touching
    - Any touching, however slight, is sufficient (76-5-407)
    - Touching requires contact with the victim's skin

76-5-403.1 Sodomy on a Child

- Touching
    - Any touching, however slight, is sufficient (76-5-407)
    - Any touching, even if accomplished through clothing, is sufficient (76-5-407)
    - Any sexual touching (act), even if accomplished through clothing, is sufficient to constitute the relevant element of the offense of Sodomy on a Child. You are instructed that an act of touching the clothed genitals and/or anus of a child is not exculpated or diminished by the fact that there is a layer of clothing between the actor and the child's genitals and/or anus. §76-5-407(3); *State v. Glenny*, 656 P.2d 990 (Utah 1982)

76-5-404 Forcible Sexual Abuse

- Touching
    - For all other theories (except indecent liberties), contact with the victim's skin is required. State v. Jacobs, 2006 UT App 356
    - "Thus, even when the specified body parts are touched through clothing, the perpetrator may still be punished under the indecent liberties prong of the statute when, considering all the surrounding circumstances, the conduct is comparable to the touching that is specifically prohibited." State v. Jacobs, 2006 UT App 356 ¶9

76-5-404.1 Sexual Abuse of a Child

- Touching
    - Any touching, however slight, is sufficient (76-5-407)
    - Any touching, even if accomplished through clothing, is sufficient (76-5-407)
    - Penetration is unnecessary to constitute the offense, touching alone is sufficient. Any sexual touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense of Sexual Abuse of Child. You are instructed that an act of touching the clothed breast, anus, genitals and/or buttocks of a child is not exculpated or diminished by the fact that there is a layer of clothing between the actor and the child's breast, anus, genitals and/or buttocks. §76-5-407(3); *State v. Glenny*, 656 P.2d 990 (Utah 1982)
- Severe psychological injury
- "Pornography" means
    - written, graphic, or other forms of communication intended to excite lascivious feelings." (AH Dictionary)
    - that which is of or pertaining to obscene literature; obscene; licentious; taken as a whole appeals to the prurient interest and lacks serious literary, artistic, political or scientific value (Black's Law)

76-5-405 Aggravated Sexual Assault

- None specific to this statute

76-5-406 Sexual Offenses Against the Victim Without Consent of Victim – Circumstances

- "To Retaliate" includes threats of physical force, kidnapping, or extortion. (76-5-406 (4) (b))
- "Health Professional" means an individual who is licensed or who holds himself or herself out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling including, but not limited to, a physician, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologies, psychiatric mental health nurse specialist, or substances abuse counselor. (76-5-406 (12) (a))
- "Religious Counselor" means a minister, priest, rabbi, bishop, or other recognized member of the clergy. (76-5-406 (12) (b))

- "Position of Special Trust" means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, a youth leader or recreational leader who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, babysitter, adult scout leader, natural parent, stepparent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent. (76-5-404 (4) (h))

76-5-412 Custodial sexual relations – Custodial sexual misconduct

- "Actor" means a correctional officer; a law enforcement officer; or an employee of, or private provider or contractor for the Department of Corrections or a county jail. (76-5-412 (1) (a))
- "Correctional Officer" means a sworn and certified officer employed by the Department of Corrections, any political subdivision of the state, or any private entity which contracts with the state or its political subdivisions to incarcerate inmates who is charged with the primary duty of providing community protection. (53-13-104)
- "Law Enforcement Officer" means a sworn and certified peace officer who is an employee of a law enforcement agency that is part of or administered by the state or any of its political subdivisions, and whose primary and principal duties consist of the prevention and detection of crime and the enforcement of criminal statutes or ordinances of this state or any of its political subdivisions. (53-13-103)
- "Private Provider or Contractor" means any person or entity that contracts with the Department of Corrections or with a county jail to provide services or functions that are part of the operations of the Department of Corrections or a county jail under state or local law. (76-5-412 (1) (c))
- Substantial Emotional or Bodily Pain

635 P.2d 89
(Cite as: 635 P.2d 89)

Supreme Court of Utah.
STATE of Utah, Plaintiff and Respondent,
v.
Michael COUCH, Defendant and Appellant.

No. 17127.
Aug. 21, 1981.

Defendant was convicted in the Third District Court, Summit County, Peter F. Leary, J., of aggravated sexual assault, forcible sodomy, and kidnapping and he appealed. The Supreme Court, Oaks, J., held that; (1) defendant's forcibly removing victim a substantial distance from her normal surroundings and natural sources of aid to an isolated area where she was entirely at mercy of defendant necessarily involved risk of serious bodily harm within the kidnapping statute and therefore the kidnapping was an independent, separately punishable offense; (2) where, without clarifying instruction, a juror might have voted for conviction in mistaken belief that word "**genitals**" as contained in forcible sodomy statute included the female breast, and "**genitals**" was key word jury had to understand as it sought to apply relevant statute to testimony in case, trial court committed reversible error when it refused to **define** word when requested to do so by jury; and (3) even if juror had misunderstood unanimity rule, that would not compel the court to grant a new trial, where jury had been properly instructed on the point.

Judgment affirmed as to convictions for aggravated sexual assault and kidnapping and conviction for forcible rape reversed and remanded for new trial.

West Headnotes

[1] Kidnapping 231E 18

231E Kidnapping
231Ek14 Elements
231Ek18 k. Confinement, restraint, or detention. Most Cited Cases
(Formerly 232k1)

Within statute providing that person commits kidnapping when he detains or restrains another "for any substantial period," the quoted term requires a period of detention longer than the minimum required in commission of rape or robbery. U.C.A.1953, 76-5-301, 76-5-301(1)(a).

[2] Kidnapping 231E 18

231E Kidnapping
231Ek14 Elements
231Ek18 k. Confinement, restraint, or detention. Most Cited Cases
(Formerly 232k1)

Kidnapping 231E 22

231E Kidnapping
231Ek22 k. Other crimes distinguished. Most Cited Cases
(Formerly 232k1)

Condition of kidnapping statute that detention be "in circumstances exposing the victim to risk of serious bodily injury" requires some circumstance of risk in addition to those inherent in the commission of crimes incidentally involving detention or restraint. U.C.A.1953, 76-5-301.

[3] Kidnapping 231E 18

231E Kidnapping

231Ek14 Elements
231Ek18 k. Confinement, restraint, or detention. Most Cited Cases
(Formerly 232k1)

Kidnapping begins when detention begins to be against the will of victim. U.C.A.1953, 76-5-301, 76-5-301(1)(a).

[4] Kidnapping 231E ⚿18

231E Kidnapping
231Ek14 Elements
231Ek18 k. Confinement, restraint, or detention. Most Cited Cases
(Formerly 232k1)

Detention began to be against prosecutrix' will when defendant continued to drive her car despite her expressed desire that he not do so and detention continued at least until sexual assault had been committed, after defendant had turned off freeway, driven down a dirt road, and stopped in deserted place where he assaulted victim, and duration of that detention was a "substantial period" within the kidnapping statute, so that the kidnapping was an independent, separately punishable offense. U.C.A.1953, 76-5-301, 76-5-301(1)(a).

[5] Sentencing and Punishment 350H ⚿531

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(A) In General
350Hk515 Particular Offenses
350Hk531 k. Kidnapping and false imprisonment. Most Cited Cases
(Formerly 110k984(3.1), 110k984(3))

Defendant's forcibly removing victim a substantial distance from her normal surroundings and natural sources of aid to isolated area where she was entirely at mercy of defendant necessarily involved risk of serious bodily harm within the kidnapping statute and therefore the kidnapping was not merely incidental or subsidiary to sexual assault, but was an independent, separately punishable offense. U.C.A.1953, 76-5-301, 76-5-301(1)(a).

[6] Criminal Law 110 ⚿1039

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1039 k. Issues related to jury trial. Most Cited Cases

Judge's refusal to give instruction requested by jurors after they had retired for deliberation would be considered by Supreme Court on appeal, even though defendant apparently took no exception to the court's failure to instruct, where it appeared that court had denied jury's request without giving notice to defendant or his attorney and that failure of Supreme Court to consider the failure to give the instruction would plainly result in miscarriage of justice. U.C.A.1953, 77-32-3 (Repealed).

[7] Criminal Law 110 ⚿772(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(2) k. Defining or describing offense. Most Cited Cases

Where juror requests it, definition of

term critical to the meaning of criminal statute is point of law and jurors cannot be considered properly instructed on criminal statute if they are demonstrably confused about meaning of the words used in it. U.C.A.1953, 77-32-3 (Repealed).

[8] Criminal Law 110 ⚿800(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k800 Definition or Explanation of Terms
110k800(2) k. Terms in common use. Most Cited Cases

Criminal Law 110 ⚿800(3)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k800 Definition or Explanation of Terms
110k800(3) k. Technical words. Most Cited Cases

Despite risk that supplying definition will obfuscate normal interpretation of familiar words, where jury at its own instance requests definition of term whose understanding is essential to proper application of the law, trial judge must provide the requested definition and, in application of that rule, there is no reason to distinguish between terms of art and nontechnical words of common usage. U.C.A.1953, 77-32-3 (Repealed).

[9] Criminal Law 110 ⚿863(2)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) k. Requisites and sufficiency. Most Cited Cases

Criminal Law 110 ⚿1174(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1174 Conduct and Deliberations of Jury
110k1174(1) k. In general. Most Cited Cases

In prosecution for forcible sodomy in which, without clarifying instruction, a juror might have voted for conviction in mistaken belief that term "**genitals**" as contained in forcible sodomy statute included the female breast, and word "**genitals**" was key word which jury had to understand as it sought to apply relevant statute to testimony in case, trial court committed reversible error when it refused to **define** word when requested to do so by jury and conviction must be reversed and cause remanded for new trial. U.S.C.1953, 76-5-403; U.C.A.1953, 77-32-3 (Repealed).

[10] Criminal Law 110 ⚿957(1)

110 Criminal Law
110XXI Motions for New Trial
110k948 Application for New Trial
110k957 Statements, Affidavits, and Testimony of Jurors
110k957(1) k. In general. Most Cited Cases

Since affidavit of juror did not allege that verdict had been determined by chance or as result of bribery, trial court properly refused to receive affidavit into evidence

on defendant's motion for new trial sought on basis that jury had improperly arrived at its verdict. U.C.A.1953, 77-38-3 (Repealed).

[11] Criminal Law 110 ⚿957(1)

110 Criminal Law
110XXI Motions for New Trial
110k948 Application for New Trial
110k957 Statements, Affidavits, and Testimony of Jurors
110k957(1) k. In general. Most Cited Cases

Juror's affidavit stating that she did not feel that she could freely and fairly discuss with her fellow jurors the evidence and deductions to be drawn therefrom did not establish that verdict had been arrived at by means other than fair expression of opinion on part of all of the jurors, within statute providing for new trial to be granted in criminal case if verdict has been so determined. U.C.A.1953, 77-38-3 (Repealed).

[12] Criminal Law 110 ⚿913(1)

110 Criminal Law
110XXI Motions for New Trial
110k913 Grounds for New Trial in General
110k913(1) k. In general. Most Cited Cases

Even if juror had misunderstood unanimity rule, that would not compel court to grant new trial, where jury had been properly instructed on the point. U.C.A.1953, 77-38-3 (Repealed).

***91** John T. Caine, Ogden, for defendant and appellant.

David L. Wilkinson, Earl F. Dorius, Salt Lake City, for plaintiff and respondent.

OAKS, Justice:

A jury found defendant guilty of aggravated sexual assault, forcible sodomy, and kidnaping, and he was sentenced to concurrent terms of five years to life, one to five years, and five years respectively. On appeal, he argues: (1) that there was insufficient evidence of kidnaping; (2) that the sodomy conviction should be set aside because the trial judge refused the jury's request to define a term of common usage; and (3) that all three convictions should be set aside because the trial court refused to admit a juror's post-trial affidavit impeaching the jury's verdict. All statutory citations are to Utah Code Annotated, 1953, as amended, except where otherwise noted.

With one exception, identified below, defendant does not contest the facts on appeal. The prosecutrix and two friends were employed at a fast-food stand in Evanston, Wyoming. At various times during their late afternoon and evening shift, defendant came to the establishment and engaged them in conversation. The girls requested that he purchase liquor for them, which he did, and after work the four met in a motel room and had a drinking party. In the early morning hours, when the prosecutrix was too intoxicated to walk, defendant insisted on driving the girls to their homes in Wanship, Utah, and surrounding areas, some 50 miles distant, in prosecutrix's car. He said that he had a friend who would drive him back to Evanston. The girls finally agreed, although one of them had consumed no alcohol and was capable of driving.

Defendant drove prosecutrix's two companions to their homes. He then drove past ***92** prosecutrix's house without stopping. Prosecutrix said, “Stop, this is

where I live," but defendant replied, "You've got to take me to the freeway so my friend can pick me up so I can hitchhike back to Evanston." He then drove onto the freeway and asked prosecutrix if she thought she could drive back from Coalville, to which she replied that she could. Defendant drove past Coalville. When they reached Echo, he asked her if she could drive back from Echo. She again replied in the affirmative. Then he asked if she would take him to Evanston. Although she said "No," defendant "just kept going." Soon he turned off the freeway and drove the car down a dirt road, stopping in a deserted place.

Defendant opened the door, pushed prosecutrix out, and ordered her to take off her clothes. When she refused, he began to pull her hair and rip at her clothes. Prosecutrix attempted to fight off defendant by kicking and hitting him. She momentarily got free of him and ran to the car, but defendant caught the car door before she could close and lock it. Defendant then pushed her into the rear seat, forcibly removed her clothing, asked her if she wanted to live, and began choking her with her belt. She testified that she "couldn't breathe for quite a while." Defendant proceeded to put his mouth first on her breast, then on her vagina, and then to rape her. Defendant then drove the car with the prosecutrix to Evanston, where he got out at a motel, and prosecutrix drove home to Utah.

I.

THE MEANING OF KIDNAPING

Defendant argues that his act of detaining prosecutrix was merely incidental to the crime of aggravated sexual assault and in effect a lesser included offense that should not be the basis for a separate conviction.[FN1]

FN1. Defendant does not contend that he has been convicted of separate offenses on the basis of a single act as prohibited by s 76-1-402. See State v. Ireland, Utah, 570 P.2d 1206 (1977). We agree that s 76-1-402 has no application to this case.

Because kidnaping statutes typically do not specify the duration of time or the circumstances under which the victim must be detained or how far the victim must be transported for a kidnap to occur, a literal application of such statutes could transform virtually every rape and robbery into a kidnaping as well. A defendant convicted of both kidnaping and what can be termed a "host crime" would in many cases receive a significantly heavier sentence than if only the host crime had been charged.

Mindful of this result, many courts have reassessed kidnaping statutes during the past two decades. Some jurisdictions have adhered to the traditional view that any detention or asportation, however slight or however closely related to another crime, is sufficient to support a kidnaping conviction.[FN2] Other courts have limited the application of kidnaping statutes to instances of "true kidnaping," where the kidnaping is not merely incidental or subsidiary to another crime but has independent significance.[FN3]

FN2. See, e. g., State v. Padilla, 106 Ariz. 230, 474 P.2d 821 (1970); State v. Ayers, 198 Kan. 467, 426 P.2d 21 (1967).

FN3. See, e. g., People v. Levy, 15 N.Y.2d 159, 256 N.Y.S.2d 793, 204

> N.E.2d 842 (1965); People v. Daniels, 71 Cal.2d 1119, 80 Cal.Rptr. 897, 459 P.2d 225, 43 A.L.R.3d 677 (1969); People v. Adams, 34 Mich.App. 546, 192 N.W.2d 19 (1971).

In contrast to some broader kidnaping statutes that have invited extensive judicial pruning, our Utah statute expressly limits the circumstances under which a detention will constitute kidnaping. Section 76-5-301 states in pertinent part:

> (1) A person commits kidnaping when he intentionally or knowingly and without authority of law and against the will of the victim:
>
> (a) Detains or restrains another for any substantial period ; or
>
> (b) Detains or restrains another in circumstances exposing him to risk of serious bodily injury ; ... (Emphasis added.)

***93** Subject to statutory exceptions not applicable here, this narrowly drafted statute limits the scope of the crime of kidnaping by permitting a conviction only if at least one of two conditions is satisfied.[FN4]

> FN4. See American Law Institute, Model Penal Code and Commentaries, s 212.1, Comment, pp. 220-226 (1980) for a discussion of policy considerations supporting such conditions.

[1][2] The first condition is that the detention be for a "substantial period." Although this term can be defined only by reference to a specific fact situation, it apparently requires a period of detention longer than the minimum inherent in the commission of a rape or a robbery. Otherwise, this statute would merely provide a cumulative penalty for the commission of these crimes and any others that involve detention or restraint. The second condition is that the detention be "in circumstances exposing the victim to risk of serious bodily injury." While no circumstance incident to crime is entirely free from risk, this provision seems to require some circumstances of risk in addition to those inherent in the commission of crimes incidentally involving detention or restraint. On the facts of this case, the jury could have based its guilty verdict on either condition of this statute.

[3][4] A kidnaping begins when the detention begins to be "against the will of the victim." In the instant case, the detention began to be against prosecutrix's will at the point where defendant continued to drive her car despite her expressed desire that he not do so, and continued at least until the sexual assault had been committed. The duration of this detention was clearly a "substantial period" within the meaning of subsection (1)(a).

[5] In addition, the circumstances in which defendant detained prosecutrix exposed her to risk of serious bodily injury within the meaning of subsection (b). Forcibly removing a person a substantial distance from her normal surroundings and natural sources of aid to an isolated area where she is entirely at the mercy of her assailant necessarily involves the risk of serious bodily harm identified in the statute.

In either case, the kidnaping was not merely incidental or subsidiary to some other crime, but was an independent, separately punishable offense. Defendant's

conviction for kidnaping is therefore affirmed.

II.
THE JURY INSTRUCTION ON FORCIBLE SODOMY

[6] The trial judge's initial instruction to the jury accurately stated the law as found in s 76-5-403, which provides:

> (1) A person commits sodomy when the actor engages in any sexual act involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant.
>
> (2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent.

After the jurors had retired for deliberation, they informed the judge through the bailiff that they desired to be further instructed on a point of law. Specifically, they asked the judge to **define** the term "**genitals**" as used in the statute. The judge refused to give the requested instruction.[FN5]

> FN5. Defendant apparently took no exception to the court's failure to instruct, but the record suggests that this omission may be excused on the facts of this case. Defendant alleged in his motion for a new trial that the court denied the jury's request without giving notice to defendant or his attorney as required by s 77-32-3, the statute applicable at the time (now superceded by s 77-35-17(m)). This Court has previously declared that it "will notice the failure to give an instruction even though it was not requested when the failure to give it would plainly result in a miscarriage of justice." State v. Day, Utah, 572 P.2d 703, 705 (1977). The same principle may apply when a party fails to except to the court's failure to give an instruction. State v. Villiard, 27 Utah 2d 204, 205, 494 P.2d 285, 286 (1972); State v. Cobo, 90 Utah 89, 101, 60 P.2d 952, 958 (1936). This principle applies to the instant case.

A conflict in the testimony suggests the reason for the jury's concern with the ***94** meaning of the word "genitals." One or more jurors might have believed defendant's denial that he put his mouth on prosecutrix's vagina, but nevertheless believed the prosecutrix's testimony that he put his mouth on her breast. Without a clarifying instruction, such a juror might have voted for conviction on the forcible sodomy charge in the mistaken belief that the term "genitals" includes the female breast. A proper definition should have prevented this mistake.

Did the trial court commit reversible error in refusing the juror's request for a **definition** of the statutory term "**genitals**"?

It is normally unnecessary and undesirable for a trial judge to volunteer definitions of terms of common usage for the jury. In State v. Day, Utah, 572 P.2d 703, 705 (1977), this Court stated:

> Ordinarily, non-technical words of ordinary meaning should not be elaborated upon in the instructions given by the court. It is presumed that jurors have ordinary intelligence and understand the meaning of ordinary words like "depraved" and "indifference."

Thus, it has been held that there was no need to define "intercourse" in a rape case, since that word has a common meaning.[FN6] On the other hand, in a case in which the defendant was accused of having administered poison, it was held that failure to instruct the jury on the meaning of "administer" was reversible error.[FN7] And in reversing for failure to define "concealed," another court held that "where the word is susceptible of differing interpretations, only one of which is a proper statement of the law, an instruction must be given."[FN8]

> FN6. Commonwealth v. Maroney, 199 Pa.Super. 561, 186 A.2d 864 (1962).
>
> FN7. People v. Gaither, 173 Cal.App.2d 662, 343 P.2d 799 (1959).
>
> FN8. McKee v. State, Alaska, 488 P.2d 1039, 1043 (1971).

Where the jury requests the instruction, however, it is generally held error to refuse to provide a definition, even where the word is a term of common meaning. People v. Ochs, 9 A.D.2d 792, 194 N.Y.S.2d 719 (1959); State v. McClure, W.Va., 253 S.E.2d 555 (1979). The United States Supreme Court, in an opinion by Justice Felix Frankfurter, expressed the basic principle as follows:

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. (Emphasis added.)

Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946). The same principle undergirds the Utah statutes in force at the time of this trial, the former s 77-32-3, which states in pertinent part:

> After the jury shall have retired for deliberation, ... if they desire to be informed on any point of law arising in the cause ... the information required must be given in the presence of, or after notice to, the prosecuting attorney and the defendant or his counsel. (Emphasis added.) [FN9]
>
> FN9. This section has since been repealed. It was replaced by the current s 77-35-17(m), which took effect July 1, 1980. The current statute states in pertinent part that if the jurors "desire to be informed on any point of law arising in the cause, ... the court shall respond to the inquiry or advise the jury that no further instructions shall be given." This case presents one circumstance in which, even under the current statute, the court should "respond to the inquiry."

[7][8] This principle applies to the instant case. Where the jury requests it, the definition of a term critical to the meaning of a criminal statute is a point of law. Jurors cannot be considered properly instructed on a criminal statute if they are demonstrably confused about the meaning of the words used in it. Despite the risk that supplying a definition will "obfuscate the normal interpretation of familiar ***95** words," [FN10] where a jury at its own instance requests the definition of a term whose understanding is essential to a proper application of the law, the trial judge must provide the requested

definition. In the application of this rule, we see no reason to distinguish between terms of art and nontechnical words of common usage. The critical fact is that the jury has signified its lack of understanding of the meaning of a word it must apply in performing its function.

FN10. State v. Nicholson, Utah, 585 P.2d 60, 63 (1978).

[9] The word "genitals" was a key word the jury had to understand as it sought to apply the relevant statute to the testimony in this case. When the jury requested a definition of that word, the trial court should have provided it. The failure to do so was reversible error. Defendant's conviction for forcible sodomy is therefore reversed, and that cause is remanded for a new trial.

III.

THE JUROR'S AFFIDAVIT

After the jury had returned its verdict in this case, defendant moved for a new trial. So far as pertinent to this appeal, that motion questioned whether the jury had improperly arrived at its verdict. Defendant submitted the affidavit of Judy Couey, a juror at the trial, which stated, inter alia, that the other jurors told her the jury must reach a unanimous decision, that in her opinion defendant was not guilty, and that she concurred in the verdict reached by the majority only because she believed that her only alternative was to convince all the other jurors that she was right. The state submitted opposing affidavits of two other jurors.

Defendant assigns error to the trial court's refusal to admit the Couey affidavit and to his denial of defendant's motion for a new trial. Rule 41 of the Utah Rules of Evidence states:

> Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined, except as provided in Rule 59, U.R.C.P. (Emphasis added.)

Rule 59 of the Utah Rules of Civil Procedure states in pertinent part:

> (a) Grounds. Subject to the provisions of Rule 61 (governing harmless error), a new trial may be granted ... for any of the following causes; ...
>
> (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors. (Emphasis added.)

[10] Since the affidavit under consideration here did not allege that the verdict had been determined "by chance or as a result of bribery," the trial court properly refused to receive the affidavit into evidence. Utah Rules of Evidence, Rule 41; U.R.C.P., Rule 59(a)(2); Johnson v. Simons, Utah, 551 P.2d 515 (1976); Hathaway v. Marx, 21 Utah 2d 33, 439 P.2d 850 (1968); Smith v. Barnett, 17 Utah 2d 240, 408 P.2d 709 (1965); Wheat v. Denver & R.G.W.R. Co., 122 Utah 418, 250 P.2d 932 (1952).[FN11]

FN11. If the affidavit had alleged misconduct of the type specified in

> Rule 59(a)(2), the court could have received it, along with other evidence on the issue of jury misconduct, and granted or denied the motion based on its weighing of the evidence.

The former s 77-38-3, now superceded by the current s 77-35-24 but in force at the time of this trial, states other circumstances where a trial court can grant a new trial in a criminal case:

> When a verdict or decision has been rendered against the defendant the court ***96** may, upon his application, grant a new trial in the following cases only:
>
> (4) When the verdict has been determined by lot or by any means other than a fair expression of opinion on the part of all the jurors. (Emphasis added.)

[11] The Couey affidavit states that "I did not feel that I could freely and fairly discuss with my fellow jurors the evidence and the deductions to be drawn therefrom." No court can ensure that, in the give and take of lively jury deliberations, every juror's opinion will be politely heard. We cannot referee the deliberative process. An affidavit alleging verdict by chance, bribery, or the like would present a different case, but the affidavit under consideration here contains no suggestion that the verdict was arrived at by a means other than the "fair expression of opinion on the part of all the jurors."

[12] Nor would Couey's allegation that she misunderstood the rule of law pertinent to unanimity, even if proved, compel the court to grant a new trial where, as here, the jury had been properly instructed on that point. Johnson v. Simons, supra; Ostertag v. LaMont, 9 Utah 2d 130, 339 P.2d 1022 (1959). In Johnson v. Simons, 551 P.2d at 516, this Court refused to grant a new trial despite the submission of

> affidavits from jurors who sat on the case which would indicate that the jury were confused as to the applicable law as enunciated by the court in its instructions, or that they disregarded the law in arriving at a verdict.

The rule that the court will ordinarily not entertain juror affidavits attempting to undermine the integrity of a verdict is of long standing and supported by the clear weight of authority. See ABA, Standards Relating to Trial by Jury 166-167 (Approved Draft, 1968); Wigmore on Evidence, Vol. VIII, ss 2348, 2349 (McNaughton rev. 1961). The Supreme Court of the Territory of Utah stated in People v. Flynn, 7 Utah 378, 384, 26 P. 1114, 1116 (1891):

> It is well settled that affidavits of jurors will not be received to impeach or question their verdict, nor to show the grounds upon which it was rendered, nor to show their misunderstanding of fact or law, nor that they misunderstood the charge of the court, or the effect of their verdict, nor their opinions, surmises, and processes of reasoning in arriving at a verdict.

More recently, this Court has stated, "Such post mortems would be productive of no end of mischief and render service as a juror unbearable." Wheat v. Denver & R.G.W.R. Co., 122 Utah at 428, 250 P.2d 932. To overturn a jury verdict on the kinds of subjective grounds suggested by the juror's affidavit here would be "to open the jury room to the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts

and destroy their sanctity and conclusiveness." Wright v. Illinois & Mississippi Tel. Co., 20 Iowa 195, 211 (1866).

The judgment of the district court is affirmed as to the convictions for aggravated sexual assault and kidnaping. The conviction for forcible sodomy is reversed and remanded for a new trial. So ordered.

HALL, C. J., and STEWART and HOWE, JJ., concur.
MAUGHAN, J., heard the arguments, but died before the opinion was filed.

Utah, 1981.
State v. Couch
635 P.2d 89

END OF DOCUMENT

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, January 8, 2013
12:00 p.m. to 2:00 p.m.
Judicial Council Room

PRESENT	EXCUSED
Judge Denise Lindberg, Chair	Judge Brendan McCullagh
Professor Jensie Anderson	John West
Professor Jennifer Andrus	Judge Michael Westfall
Judge James Blanch	Scott Young
Mark Field	
Sandi Johnson	
Linda Jones	
Karen Klucznik	
Thomas Pedersen, Intern	

1. Welcome and Approval of Minutes **Judge Denise Lindberg**

Judge Lindberg welcomed everyone to the meeting. *Ms. Johnson moved to approve the minutes from the previous meeting. Ms. Andrus seconded the motion and it passed unanimously.*

2. Mens Rea Committee Notes **Judge Denise Lindberg**

Judge Lindberg discussed the mens rea committee notes that have previously been approved. She stated that Ms. Adams-Perlac agreed to put them together and circulate them to the committee. She stated that she thinks the committee notes are correct. The committee reviewed the notes.

Ms. Johnson stated that she did not remember examples of the crimes being used in the committee note, e.g. murder in 302B. Ms. Klucznik agreed. Ms. Jones stated that the language used was in the previously published committee note. Ms. Jones stated that perhaps is should refer to "intentional murder" instead of just "murder". Ms. Johnson stated that the note contains references to the statute, so reading them together she would leave it as written.

The committee approved the committee notes to instructions CR 302A, CR 302B, CR 302C, CR 303A, CR CR 303B, CR 303C, CR 304A, CR 304B, and CR 304C as written.

3. Sexual Offense Instructions **Committee**

The committee reviewed the sexual offense instructions. The committee discussed making minor changes to capitalization in the title of the instructions and name of the crime within the

instructions. Ms. Klucznik recommended changing "one or more" to "each and every" as the committee previously agreed in CR 1606. The committee agreed that "one or more" should be changed to "each and every" on the NOT GUILTY portion of each instruction as it is on the GUILTY portion.

Ms. Johnson suggested flipping element 2 and element 3 in CR 1612, so that "intentionally, knowingly, or recklessly" comes before "with the intent to".

The instructions previously approved stand approved changing "one or more of the elements" to "each and every element" language and flipping element 2 and element 3 in CR 1612.

Ms. Jones suggested breaking down the first bullet on the Aggravated Sexual Abuse of a Child special verdict form into multiple bullets. Ms. Klucznik agreed. Ms. Jones suggested have a separate elements instruction for Aggravated Sexual Abuse of a Child. Ms. Klucznik stated that the special verdict form makes a cleaner record on appeal. Ms. Jones stated that it is confusing if the charge is aggravated, unless the aggravating factor is an element in the elements instruction. Ms. Jones stated that there is a difference between aggravated crimes, and an enhancement. Ms. Klucznik stated that Aggravated Murder is an exception. Judge Blanch stated that a special verdict form instructs on a lesser included offense. Ms. Klucznik stated that defense attorneys have the right to decide whether they want to charge lesser included offenses. Ms. Jones stated that putting it in a special verdict form makes it confusing, because it is not an enhancement. Ms. Johnson stated that it is an enhancement. Ms. Jones stated that aggravated sexual abuse of a child is a higher charge. Ms. Jones stated that there are two statutes, Sexual Abuse of a Child, and Aggravated Sexual Abuse of a Child. Ms. Klucznik stated that she has never seen Aggravated Sexual Abuse of a Child as an enhancement. Mr. Field and Ms. Anderson agreed. Ms. Jones stated that a special verdict form does not communicate a lesser included offense to the jury. Ms. Johnson disagrees that Sexual Abuse of a Child is a lesser included offense of Aggravated Sexual Abuse of a Child.

Ms. Jones stated that the State will typically charge Aggravated Sexual Abuse of a Child, so there should be an elements instruction. She said that if there is a case where Sexual Abuse of a Child is being charged as a lesser included offense, then a special verdict form might be necessary. Ms. Klucznik agreed and stated that it makes the record cleaner. Ms. Jones stated that the special verdict form makes sense if there are multiple possible aggravating circumstances.

Ms. Jones moved to include an elements instruction for Sexual Abuse of a Child and Aggravated Sexual Abuse of a Child, and include a special verdict form on Aggravated Sexual Abuse of a Child. Ms. Adams-Perlac will draft a proposed Aggravated Sexual Abuse of a Child instruction for review at the next meeting. Ms. Klucznik and Ms. Johnson will research whether the issue to determine whether a special verdict form or an instructions form is needed for Aggravated Sexual Abuse of a Child.

The committee discussed Aggravated Sexual Assault. Ms. Jones stated that there is no Sexual Assault statute, and it is unnecessary as stated under *State v. Rudolph*.

Ms. Adams-Perlac will draft an instruction on Aggravated Sexual Assault for review at the next meeting.

Ms. Jones stated that there is still no opinion in the consent case. Ms. Klucznik questioned whether we need to include that a specific definitions only applies for crimes committed after a certain date (since a previous statute might apply to an older offense). The committee determined that it should focus on new statutes and trust attorneys to do their job when an older statute applies.

4. Sexual Offense Definitions **Sandi Johnson**

The committee reviewed the sexual offense definitions. Ms. Jones stated these definitions are proposed to be a jury instruction. Ms. Jones asked whether a definition for age is necessary and Ms. Johnson stated that it probably is not. Ms. Jones stated that there is a case that states when the

legislature defines terms those are words with special meanings. She stated that there is case law that when the terms are not defined, you can assume that the jury understands it and will use its ordinary meaning. Ms. Jones is concerned that by defining terms that are not already defined in statute, we are putting them into a box.

Ms. Klucznik stated all we need to determine is which definitions are terms of art. She stated that words like "breast" do not need to be included. However, if there is a definition by statute or by case law, they need be included. The committee determined to remove any that do not have a definition provided by statute or case law.

The committee deleted the age, anus, and breast definitions. The committee limited the definition of "buttocks" "does not include the anus." The committee deleted the definitions of child.

Ms. Jones discussed "indecent liberties." Ms. Jones provided a new definition of indecent liberties as follows:

> "Indecent liberties" is an act of the same magnitude of gravity as [the act specifically described in the statute]. To determine whether Defendant's conduct is of equal gravity to [the act described in the statute], consider the totality of the facts and all the surrounding circumstances, including the following factors: (1) the nature of the victim's participation (whether defendant required the victim's active participation), (2) the duration of the defendant's act, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim. If after considering all the surrounding circumstances, the conduct is comparable to [the touching that is specifically prohibited], the act qualifies as indecent liberties. *State ex rel. J.L.S.*, 610 P.2d 1294, 1296 (Utah 1980), *State v. Bishop*, 753 P.2d 439 (Utah 1988), *State v. Balfour*, 2008 UT App 410, ¶ 15, 198 P.3d 471.

Ms. Johnson stated that she thinks "genitals" need to be defined. Ms. Jones stated that she agrees and that there is case law defining "genitals".

Ms. Klucznik and Ms. Jones will find the case and provide it to the committee for the next meeting.

Ms. Klucznik stated that she did not think "sexual intercourse" should be defined. She also stated that "substantial emotional or bodily pain" is a jury question. The committee removed those two definitions. The committee deleted the general definition of "touching", and referred the reader to touching as defined in each offense. The committee discussed touching and determined that the way it is outlined in each offense is helpful.

Ms. Johnson moved to delete the definitions as indicated above. She stated that penetration and touching need have individual definitions for each of the statutes. Ms. Jones stated that there will be an instruction for each definition, with a committee note if necessary. Ms. Andrus stated that it is common to have definitions together at the end of a document.

Judge Blanch stated that Utah Code section 76-1-601 has many definitions that may need to be included. He stated if we are defining things generally in the future, we need to include all of those definitions, including omission, etc.

5. Other Business

There was no other business discussed at the meeting.

6. Adjourn

The meeting was adjourned at 1:29 p.m. The next meeting will be held on Wednesday, February 5, 2014 at 12:00 p.m.