

**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, August 7, 2013  
12:00 p.m. to 2:00 p.m.  
Judicial Council Room

**AGENDA**

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1. Welcome and Approval of Minutes
2. Discussion of Organization of the Instructions
3. Unlawful Sexual Conduct with a Minor
4. Jailhouse Informant
5. Object Rape
6. Object Rape of a Child
7. Forcible Sodomy
8. Sodomy on a Child
9. Adjourn

## UNLAWFUL SEXUAL CONDUCT WITH A MINOR

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### INSTRUCTION \_\_\_\_\_

The defendant, (NAME), is charged [in Count \_\_\_\_\_] with 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. That the defendant, \_\_\_\_\_ (NAME);
2. Engaged in sexual conduct with \_\_\_\_\_ [MINOR'S INITIALS];
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, the defendant was:
  - A) seven, eight, or nine years older than \_\_\_\_\_ [MINOR'S INITIALS] and the defendant knew or reasonably should have known the age of \_\_\_\_\_ [MINOR'S INITIALS]; or
  - B) was 10 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.

INSTRUCTION \_\_\_\_\_

Definitions of "Sexual Conduct" under 76-5-401.2

- 1) The defendant had sexual intercourse with \_\_\_\_\_ [MINOR'S INITIALS]; or
- 2) 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, regardless of the sex of either participant; or
- 3) With the intent to cause substantial emotional or bodily pain to any person, the defendant 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, regardless of the sex of any participant; or
- 4) With the intent to arouse or gratify the sexual desire of any person, the defendant touched the anus, buttocks, or any part of the genitals of \_\_\_\_\_ [MINOR'S INITIALS], or touched the breast of \_\_\_\_\_ [MINOR'S INITIALS], 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.

Committee Note: please use whichever definitions apply. However, if the State intends to rely on definition 4 in combination with 1, 2, or 3, a special verdict form will be necessary

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[LOCATION] JUDICIAL DISTRICT COURT, [IF APPLICABLE] DEPARTMENT,  
IN AND FOR [COUNTY] COUNTY, STATE OF UTAH

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THE STATE OF UTAH, :  
 : **SPECIAL VERDICT**  
 Plaintiff, :  
 : Count [#]  
 -vs- :  
 :  
 [Name], :  
 : Case No. [\*\*]  
 Defendant. :

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We, the jury, having found the defendant, [Name], guilty of Unlawful Sexual Conduct with a 16 or 17 Year Old, as charged in Count [#] of the Information, found beyond a reasonable doubt the defendant engaged in the following “sexual conduct” (check all that apply):

- The defendant had sexual intercourse with \_\_\_\_\_ [MINOR’S INITIALS]; or
- 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, regardless of the sex of either participant; or
- With the intent to cause substantial emotional or bodily pain to any person, the defendant 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, regardless of the sex of any participant; or
- With the intent to arouse or gratify the sexual desire of any person, the defendant touched the anus, buttocks, or any part of the genitals of \_\_\_\_\_ [MINOR’S INITIALS], or touched the breast of \_\_\_\_\_ [MINOR’S INITIALS], 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[\*\*].

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Foreperson

## **JAILHOUSE INFORMANT**

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You have heard from a witness who may be classified as [a “jailhouse informer”] [an accomplice]. The law allows the use of such testimony. Bear in mind that such a witness may have an interest in the case different from that of an ordinary witness.

A witness who believes [he/she] may be able to obtain [his/her] own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has motive to testify falsely. Therefore, you must examine that testimony with caution and weigh it with great care. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider:

- (1) whether the informer has received anything (including leniency in prosecution, personal advantage, or vindication) in exchange for testimony;
- (2) other cases, and the number of other cases, in which the informer testified or offered statements against another, whether those statements are being used, and whether the informer received any deal, promise, inducement, or benefit in exchange for that testimony or statement[,]  
or believed he was likely to receive some benefit from his cooperation;
- (3) whether the informer has ever changed his or her testimony;
- (4) the criminal history of the informant, not just limited to number of convictions, but also the level of sophistication gained through the informer's experience in the criminal justice system; and
- (5) any other evidence related to the informer's credibility.

After scrutinizing such testimony, you may give it whatever weight, if any, you find it deserves.

## OBJECT RAPE

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Utah Code 76-5-402.2

### INSTRUCTION \_\_\_\_\_

The defendant, (NAME), is charged with Object Rape. You cannot convict [him][her] of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. The defendant, (NAME);
2. Intentionally, knowingly, or recklessly;
3. Caused the penetration, however slight;
4. Of the genital or anal opening of another person, who is 14 years or older;
5. By any object or substance other than the mouth or genitals;
6. With the intent to cause substantial emotional or bodily pain to the alleged victim or with the intent to arouse or gratify the sexual desire of any person; and
7. Without that other person'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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant **NOT GUILTY**.

FN See Special Verdict Form for Prior Conviction or Serious Bodily Injury

## **OBJECT RAPE OF A CHILD**

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Utah Code 76-5-402.3

### INSTRUCTION \_\_\_\_\_

The defendant, (NAME), is charged with Object Rape of a Child. You cannot convict [him][her] of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. The defendant, (NAME);
2. Intentionally, knowingly, or recklessly;
3. Caused the penetration, however slight;
4. Of the genital or anal opening of another person, who is 13 years of age or younger;
5. By any object or substance other than a part of the human body;
6. With the intent to cause substantial emotional or bodily pain to the alleged victim or with the intent to arouse or gratify the sexual desire of any person.

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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant **NOT GUILTY**.

FN See Special Verdict Form for Prior Conviction or Serious Bodily Injury

## **FORCIBLE SODOMY**

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Utah Code 76-5-403

### INSTRUCTION \_\_\_\_\_

The defendant, (NAME), is charged with Forcible Sodomy. You cannot convict [him][her] of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. The defendant, (NAME);
2. Intentionally, knowingly, or recklessly;
3. Committed a sexual act involving the genitals of one person and the mouth or anus of another, regardless of the sex of either participant;
4. With a person who is 14 years of age or older at the time of the offense;
5. Without that other person'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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant **NOT GUILTY**.

FN See Special Verdict Form for Prior Conviction or Serious Bodily Injury

## SODOMY ON A CHILD

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Utah Code 76-5-403.1

### INSTRUCTION \_\_\_\_\_

The defendant, (NAME), is charged with Sodomy on a Child. You cannot convict [him][her] of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. The defendant, (NAME);
2. Intentionally, knowingly, or recklessly;
3. Committed a sexual act involving the genitals of one person and the mouth or anus of another, regardless of the sex of either participant;
4. With a person who is under 13 years of age or younger 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 one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant **NOT GUILTY**.

FN See Special Verdict Form for Prior Conviction or Serious Bodily Injury

## Excerpt from *State v. Charles*, 2011 UT App 291

### III. Jury Instruction

¶ 40 Defendant also argues that the trial court erred by failing to provide a jury instruction regarding how to weigh jailhouse informant testimony. FN15 Defendant requested a lengthy instruction modeled after an instruction required in Oklahoma whenever a jailhouse informant testifies. FN16 See *Dodd v. State*, 2000 OK CR 2, ¶ 26, 993 P.2d 778, 784. Over defense counsel's objection, the court instead instructed the jury as follows:

FN15. Although not necessary to our decision in view of our reversal on other grounds, it is appropriate that we comment on this issue. See Utah R.App. P. 30(a) (“If a new trial is granted, the court may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.”); *State v. Cloud*, 722 P.2d 750, 755 (Utah 1986) (“When a new trial or further proceeding is ordered, it is our duty to pass upon questions of law which may be pertinent and helpful in arriving at a final determination of the case.”) (citation and internal quotation marks omitted).

FN16. Utah's model jury instructions do not include a pattern instruction addressing testimony by a jailhouse informant. See Model Utah Jury Instructions (2d ed.).

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case.

¶ 41 We are not necessarily persuaded at this point that the trial court erred by giving the jury this instruction, particularly in the \*480 context of the unusually broad latitude the court gave Defendant to present testimony regarding every detail that might be relevant to the jury's consideration of the informant's credibility, including allowing testimony regarding the informant's crimes that were older than ten years and testimony regarding crimes that were not related to honesty. See generally Utah R. Evid. 609.FN17 Nevertheless, on balance, it does seem to us that the better instruction is the one Defendant proposed.FN18 It is more specific to the issues that may arise when a jailhouse informant

testifies, and we think it would be helpful to the jury based on the particular factual circumstances of the informant's testimony in this case.

FN17. Rule 609 provides some limits on the admissibility of evidence for purposes of attacking the credibility of a witness other than the accused depending on the nature of the evidence. For example, “evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” Utah R. Evid. 609(a)(2). However, “evidence that a witness ... has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year,” if the court “determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” Id. 609(a)(1). In addition,

[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Id. 609(b).

FN18. Defense counsel requested the following instruction:

You have heard from a witness who may be classified as a “jailhouse informer.” The law allows the use of such testimony. However[,] the testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider:

- (1) whether the informer has received anything (including leniency in prosecution, personal advantage, or vindication) in exchange for testimony;
- (2) other cases, and the number of other cases, in which the informer testified or offered statements against another, whether those statements are being used, and whether the informer received any deal, promise, inducement, or benefit in exchange for that testimony or statement[,] or believed he was likely to receive some benefit from his cooperation;
- (3) whether the informer has ever changed his or her testimony;
- (4) the criminal history of the informant, not just limited to number of convictions, but also the level of sophistication gained through the informer's experience in the criminal justice system; and

(5) any other evidence related to the informer's credibility.

In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you would want to give to the jailhouse informer.

You should bear in mind that a witness who has entered into such an agreement with the government may have an interest in the case different than any ordinary witness. A witness who believes that he may be able to obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has motive to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. If, after scrutinizing his testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.

#### CONCLUSION

¶ 42 We see no due process violation here based on either the State's delay in charging Defendant or its methods of investigation. However, considering the circumstantial nature of the evidence upon which Defendant was convicted and the cumulative effect of defense counsel's errors, we think there is a reasonable probability that, absent the errors, the jury would have had a reasonable doubt about his guilt. See *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. Accordingly, we reverse Defendant's conviction and remand for a new trial.