



28 to commit either of these offenses, that the actor mistakenly believed the victim to be 16 years  
29 of age or older at the time of the alleged offense or was unaware of the victim's true age.

30 Section 2. Section **76-3-406** is amended to read:

31 **76-3-406. Crimes for which probation, suspension of sentence, lower category of**  
32 **offense, or hospitalization shall not be granted.**

33 Notwithstanding Sections 76-3-201 and 77-18-1 and Title 77, Chapter [16] 16a, except  
34 as provided in Section 76-5-406.5, probation shall not be granted, the execution or imposition  
35 of sentence shall not be suspended, the court shall not enter a judgment for a lower category of  
36 offense, and hospitalization shall not be ordered, the effect of which would in any way shorten  
37 the prison sentence for any person who commits a capital felony or a first degree felony  
38 involving:

- 39 (1) Section 76-5-202, aggravated murder;
- 40 (2) Section 76-5-203, murder;
- 41 (3) Section 76-5-301.1, child kidnaping;
- 42 (4) Section 76-5-302, aggravated kidnaping;
- 43 (5) Section 76-5-402.1, rape of a child;
- 44 (6) Section 76-5-402.3, object rape of a child;
- 45 (7) Section 76-5-403.1, sodomy on a child;
- 46 (8) Subsections 76-5-404.1[(3)] (4) and [(4)] (5), aggravated sexual abuse of a child;
- 47 (9) Section 76-5-405, aggravated sexual assault; or
- 48 (10) any attempt to commit a felony listed in Subsections (5), (6), and (7).

49 Section 3. Section **76-5-404.1** is amended to read:

50 **76-5-404.1. Sexual abuse of a child -- Aggravated sexual abuse of a child.**

51 (1) As used in this section, "child" means a person under the age of 14.

52 [(1)] (2) A person commits sexual abuse of a child if, under circumstances not  
53 amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to  
54 commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the  
55 breast of a female child [~~younger than 14 years of age~~], or otherwise takes indecent liberties  
56 with a child, or causes a child to take indecent liberties with the actor or another with intent to  
57 cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify  
58 the sexual desire of any person regardless of the sex of any participant.

59           ~~[(2)]~~ (3) Sexual abuse of a child is punishable as a second degree felony.

60           ~~[(3)]~~ (4) A person commits aggravated sexual abuse of a child when in conjunction  
61 with the offense described in Subsection ~~[(1)]~~ (2) any of the following circumstances have been  
62 charged and admitted or found true in the action for the offense:

63           (a) the offense was committed by the use of a dangerous weapon as defined in Section  
64 76-1-601, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or  
65 was committed during the course of a kidnaping;

66           (b) the accused caused bodily injury or severe psychological injury to the victim during  
67 or as a result of the offense;

68           (c) the accused was a stranger to the victim or made friends with the victim for the  
69 purpose of committing the offense;

70           (d) the accused used, showed, or displayed pornography or caused the victim to be  
71 photographed in a lewd condition during the course of the offense;

72           (e) the accused, prior to sentencing for this offense, was previously convicted of any  
73 felony, or of a misdemeanor involving a sexual offense;

74           (f) the accused committed the same or similar sexual act upon two or more victims at  
75 the same time or during the same course of conduct;

76           (g) the accused committed, in Utah or elsewhere, more than five separate acts, which if  
77 committed in Utah would constitute an offense described in this chapter, and were committed  
78 at the same time, or during the same course of conduct, or before or after the instant offense;

79           (h) the offense was committed by a person who occupied a position of special trust in  
80 relation to the victim; "position of special trust" means that position occupied by a person in a  
81 position of authority, who, by reason of that position is able to exercise undue influence over  
82 the victim, and includes, but is not limited to, a youth leader or recreational leader who is an  
83 adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor,  
84 employer, foster parent, baby-sitter, adult scout leader, natural parent, stepparent, adoptive  
85 parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent;

86           (i) the accused encouraged, aided, allowed, or benefited from acts of prostitution or  
87 sexual acts by the victim with any other person, or sexual performance by the victim before any  
88 other person; or

89           (j) the accused caused the penetration, however slight, of the genital or anal opening of

90 the child by any part or parts of the human body other than the genitals or mouth.

91 [~~4~~] (5) Aggravated sexual abuse of a child is a first degree felony punishable by  
92 imprisonment for an indeterminate term of not less than five years and which may be for life.  
93 Imprisonment is mandatory in accordance with Section 76-3-406.

94 Section 4. Section **76-5-406** is amended to read:

95 **76-5-406. Sexual offenses against the victim without consent of victim --**

96 **Circumstances.**

97 An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a  
98 child, object rape, attempted object rape, object rape of a child, attempted object rape of a  
99 child, sodomy, attempted sodomy, forcible sodomy, attempted forcible sodomy, sodomy upon a  
100 child, attempted sodomy upon a child, forcible sexual abuse, attempted forcible sexual abuse,  
101 sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child,  
102 attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the  
103 victim under any of the following circumstances:

104 (1) the victim expresses lack of consent through words or conduct;

105 (2) the actor overcomes the victim through the actual application of physical force or  
106 violence;

107 (3) the actor is able to overcome the victim through concealment or by the element of  
108 surprise;

109 (4) (a) (i) the actor coerces the victim to submit by threatening to retaliate in the  
110 immediate future against the victim or any other person, and the victim perceives at the time  
111 that the actor has the ability to execute this threat; or

112 (ii) the actor coerces the victim to submit by threatening to retaliate in the future  
113 against the victim or any other person, and the victim believes at the time that the actor has the  
114 ability to execute this threat;

115 (b) as used in this Subsection (4) "to retaliate" includes but is not limited to threats of  
116 physical force, kidnaping, or extortion;

117 (5) the victim has not consented and the actor knows the victim is unconscious,  
118 unaware that the act is occurring, or physically unable to resist;

119 (6) the actor knows that as a result of mental disease or defect, the victim is at the time  
120 of the act incapable either of appraising the nature of the act or of resisting it;

121 (7) the actor knows that the victim submits or participates because the victim  
122 erroneously believes that the actor is the victim's spouse;

123 (8) the actor intentionally impaired the power of the victim to appraise or control his or  
124 her conduct by administering any substance without the victim's knowledge;

125 (9) the victim is younger than 14 years of age;

126 (10) the victim is younger than 18 years of age and at the time of the offense the actor  
127 was the victim's parent, stepparent, adoptive parent, or legal guardian or occupied a position of  
128 special trust in relation to the victim as defined in Subsection 76-5-404.1~~(3)(h)~~ (4)(h);

129 (11) the victim is 14 years of age or older, but younger than 18 years of age, and the  
130 actor is more than three years older than the victim and entices or coerces the victim to submit  
131 or participate, under circumstances not amounting to the force or threat required under  
132 Subsection (2) or (4); or

133 (12) the actor is a health professional or religious counselor, as those terms are defined  
134 in this Subsection (12), the act is committed under the guise of providing professional  
135 diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed  
136 that the act was for medically or professionally appropriate diagnosis, counseling, or treatment  
137 to the extent that resistance by the victim could not reasonably be expected to have been  
138 manifested. For purposes of this Subsection (12):

139 (a) "health professional" means an individual who is licensed or who holds himself out  
140 to be licensed, or who otherwise provides professional physical or mental health services,  
141 diagnosis, treatment, or counseling including, but not limited to, a physician, osteopathic  
142 physician, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service  
143 worker, clinical social worker, certified social worker, marriage and family therapist,  
144 professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or  
145 substance abuse counselor; and

146 (b) "religious counselor" means a minister, priest, rabbi, bishop, or other recognized  
147 member of the clergy.

148 Section 5. Section **76-5-406.5** is amended to read:

149 **76-5-406.5. Circumstances required for probation or suspension of sentence for**  
150 **certain sex offenses against a child.**

151 (1) In a case involving conviction, for Section 76-5-402.1, rape of a child; Section

152 76-5-402.3, object rape of a child; Section 76-5-403.1, sodomy on a child; or any attempt to  
153 commit a felony under those sections or a conviction for Subsections 76-5-404.1~~[(3)]~~ (4) and  
154 ~~[(4)]~~ (5), aggravated sexual abuse of a child, the court may suspend execution of sentence and  
155 consider probation to a residential sexual abuse treatment center only if all of the following  
156 circumstances are found by the court to be present and the court in its discretion, considering  
157 the circumstances of the offense, including the nature, frequency, and duration of the conduct,  
158 and considering the best interests of the public and the child victim, finds probation to a  
159 residential sexual abuse treatment center to be proper:

160 (a) the defendant did not use a weapon, force, violence, substantial duress or menace,  
161 or threat of harm, in committing the offense or before or after committing the offense, in an  
162 attempt to frighten the child victim or keep the child victim from reporting the offense;

163 (b) the defendant did not cause bodily injury to the child victim during or as a result of  
164 the offense and did not cause the child victim severe psychological harm;

165 (c) the defendant, prior to the offense, had not been convicted of any public offense in  
166 Utah or elsewhere involving sexual misconduct in the commission of the offense;

167 (d) the defendant did not commit an offense described in Part 4, Sexual Offenses, of  
168 this chapter against more than one child victim or victim, at the same time, or during the same  
169 course of conduct, or previous to or subsequent to the instant offense;

170 (e) the defendant did not use, show, or display pornography or create sexually-related  
171 photographs or tape recordings in the course of the offense;

172 (f) the defendant did not act in concert with another offender during the offense or  
173 knowingly commit the offense in the presence of a person other than the victim or with lewd  
174 intent to reveal the offense to another;

175 (g) the defendant did not encourage, aid, allow, or benefit from any act of prostitution  
176 or sexual act by the child victim with any other person or sexual performance by the child  
177 victim before any other person;

178 (h) the defendant admits the offense of which he has been convicted and has been  
179 accepted for mental health treatment in a residential sexual abuse treatment center that has been  
180 approved by the Department of Corrections under Subsection (3);

181 (i) rehabilitation of the defendant through treatment is probable, based upon evidence  
182 provided by a treatment professional who has been approved by the Department of Corrections

183 and the Department of Human Services under Subsection (3) and who has accepted the  
184 defendant for treatment;

185 (j) the defendant has undergone a complete psychological evaluation conducted by a  
186 professional approved by the Department of Corrections and the Department of Human  
187 Services and:

188 (i) the professional's opinion is that the defendant is not an exclusive pedophile and  
189 does not present an immediate and present danger to the community if released on probation  
190 and placed in a residential sexual abuse treatment center; and

191 (ii) the court accepts the opinion of the professional;

192 (k) if the offense is committed by a parent, stepparent, adoptive parent, or legal  
193 guardian of the child victim, the defendant shall, in addition to establishing all other conditions  
194 of this section, establish it is in the child victim's best interest that the defendant not be  
195 imprisoned by presenting evidence provided by a treatment professional who:

196 (i) is treating the child victim and understands he will be treating the family as a whole;

197 or

198 (ii) has assessed the child victim for purposes of treatment as ordered by the court  
199 based on a showing of good cause; and

200 (l) if probation is imposed, the defendant, as a condition of probation, may not reside in  
201 a home where children younger than 18 years of age reside for at least one year beginning with  
202 the commencement of treatment, and may not again take up residency in a home where  
203 children younger than 18 years of age reside during the period of probation until allowed to do  
204 so by order of the court.

205 (2) A term of incarceration of at least 90 days is to be served prior to treatment and  
206 continue until such time as bed space is available at a residential sexual abuse treatment center  
207 as provided under Subsection (3) and probation is to be imposed for up to a maximum of ten  
208 years.

209 (3) (a) The Department of Corrections shall develop qualification criteria for the  
210 approval of the sexual abuse treatment programs and professionals under this section. The  
211 criteria shall include the screening criteria employed by the department for sexual offenders.

212 (b) The sexual abuse treatment program shall be at least one year in duration, shall be  
213 residential, and shall specifically address the sexual conduct for which the defendant was

214 convicted.

215 (4) Establishment by the defendant of all the criteria of this section does not mandate  
216 the granting under this section of probation or modification of the sentence that would  
217 otherwise be imposed by Section 76-3-406 regarding sexual offenses against children. The  
218 court has discretion to deny the request based upon its consideration of the circumstances of the  
219 offense, including:

- 220 (a) the nature, frequency, and duration of the conduct;
- 221 (b) the effects of the conduct on any child victim involved;
- 222 (c) the best interest of the public and any child victim; and
- 223 (d) the characteristics of the defendant, including any risk the defendant presents to the  
224 public and specifically to children.

225 (5) The defendant has the burden to establish by a preponderance of evidence  
226 eligibility under all of the criteria of this section.

227 (6) If the court finds a defendant granted probation under this section fails to cooperate  
228 or succeed in treatment or violates probation to any substantial degree, the sentence previously  
229 imposed for the offense shall be immediately executed.

230 (7) The court shall enter written findings of fact regarding the conditions established by  
231 the defendant that justify the granting of probation under this section.

232 (8) In cases involving conviction of any sexual offense against a child other than those  
233 offenses provided in Subsection (1), the court shall consider the circumstances described in  
234 Subsection (1) as advisory in determining whether or not execution of sentence should be  
235 suspended and probation granted. The defendant is not required to satisfy all of those  
236 circumstances for eligibility pursuant to this Subsection (8).

237 Section 6. Section **77-27-9** is amended to read:

238 **77-27-9. Parole proceedings.**

239 (1) (a) The Board of Pardons and Parole may pardon or parole any offender or  
240 commute or terminate the sentence of any offender committed to a penal or correctional facility  
241 under the jurisdiction of the Department of Corrections for a felony or class A misdemeanor  
242 except as provided in Subsection (2).

243 (b) The board may not release any offender before the minimum term has been served  
244 unless the board finds mitigating circumstances which justify the release and unless the board

245 has granted a full hearing, in open session, after previous notice of the time and place of the  
246 hearing, and recorded the proceedings and decisions of the board.

247 (c) The board may not pardon or parole any offender or commute or terminate the  
248 sentence of any offender unless the board has granted a full hearing, in open session, after  
249 previous notice of the time and place of the hearing, and recorded the proceedings and  
250 decisions of the board.

251 (d) The release of an offender shall be at the initiative of the board, which shall  
252 consider each case as the offender becomes eligible. However, a prisoner may submit his own  
253 application, subject to the rules of the board promulgated in accordance with Title 63, Chapter  
254 46a, Utah Administrative Rulemaking Act.

255 (2) (a) A person sentenced to prison prior to April 29, 1996, for a first degree felony  
256 involving child [~~kidnaping~~] kidnapping, a violation of Section 76-5-301.1; aggravated  
257 [~~kidnaping~~] kidnapping, a violation of Section 76-5-302; rape of a child, a violation of Section  
258 76-5-402.1; object rape of a child, a violation of Section 76-5-402.3; sodomy upon a child, a  
259 violation of Section 76-5-403.1; aggravated sexual abuse of a child, a violation of Subsection  
260 76-5-404.1[~~(3)~~] (4); aggravated sexual assault, a violation of Section 76-5-405; or a prior  
261 offense as described in Section 76-3-407, may not be eligible for release on parole by the Board  
262 of Pardons and Parole until the offender has fully completed serving the minimum mandatory  
263 sentence imposed by the court. This subsection supersedes any other provision of law.

264 (b) The board may not parole any offender or commute or terminate the sentence of  
265 any offender before the offender has served the minimum term for the offense, if the offender  
266 was sentenced prior to April 29, 1996, and if:

267 (i) the offender was convicted of forcible sexual abuse, forcible sodomy, rape,  
268 aggravated assault, [~~kidnaping~~] kidnapping, aggravated [~~kidnaping~~] kidnapping, or aggravated  
269 sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person; and

270 (ii) the victim of the offense was under 18 years of age at the time the offense was  
271 committed.

272 (c) For a crime committed on or after April 29, 1996, the board may parole any  
273 offender under Subsections (2)(b)(i) and (ii) for lifetime parole as provided in Section 77-27-9.

274 (d) The board may not pardon or parole any offender or commute or terminate the  
275 sentence of any offender who is sentenced to life in prison without parole except as provided in

276 Subsection (6).

277 (e) On or after April 27, 1992, the board may commute a sentence of death only to a  
278 sentence of life in prison without parole.

279 (f) The restrictions imposed in Subsections 77-27-9 (2) (d) and (e) apply to all cases  
280 that come before the Board of Pardons and Parole on or after April 27, 1992.

281 (3) The board may issue subpoenas to compel the attendance of witnesses and the  
282 production of evidence, to administer oaths, and to take testimony for the purpose of any  
283 investigation by the board or any of its members or by a designated hearing examiner in the  
284 performance of its duties. A person who willfully disobeys a properly served subpoena issued  
285 by the board is guilty of a class B misdemeanor.

286 (4) (a) The board may adopt rules consistent with law for its government, meetings and  
287 hearings, the conduct of proceedings before it, the parole and pardon of offenders, the  
288 commutation and termination of sentences, and the general conditions under which parole may  
289 be granted and revoked.

290 (b) The rules shall ensure an adequate opportunity for victims to participate at hearings  
291 held under this chapter, as provided in Section 77-27-9.5.

292 (c) The rules may allow the board to establish reasonable and equitable time limits on  
293 the presentations by all participants in hearings held under this chapter.

294 (5) The board does not provide counseling or therapy for victims as a part of their  
295 participation in any hearing under this chapter.

296 (6) The board may parole a person sentenced to life in prison without parole if the  
297 board finds by clear and convincing evidence that the person is permanently incapable of being  
298 a threat to the safety of society.

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**Legislative Review Note**

**as of 1-20-03 3:24 PM**

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**

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**Fiscal Note**

Sexual Abuse of a Child Amendments

29-Jan-03

**Bill Number HB0210**4:49 PM

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**State Impact**

No fiscal impact.

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**Individual and Business Impact**No fiscal impact.

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**Office of the Legislative Fiscal Analyst**