

Ala. Code 1975, § 13A-6-65(a)(3)

Sexual Misconduct
(Deviate Sexual Intercourse)

The defendant is charged with sexual misconduct.

A person commits the crime of sexual misconduct if he/she engages in deviate sexual intercourse with another person under circumstances other than those covered by sodomy in the first or second degree.

To convict, the State must prove beyond a reasonable doubt each of the following elements:

- (1) The defendant engaged in deviate sexual intercourse with **[Insert Victim's name]**;
- (2) The defendant did so under circumstances **[Describe]** other than those covered by sodomy in the first or second degree **[Insert appropriate instructions]**;
- (3) The defendant acted **[Insert appropriate mens rea element - See Use Note]**.

[Read ONLY if applicable]: Consent is no defense to a prosecution under this subdivision. **[Note:** However, if consent is raised as a defense, then a consent charge is due to be given. The U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L. Ed. 2d 508, (2003), held a Texas statute making it a crime for two persons of the same sex to engage in consensual deviate sexual intercourse unconstitutional. The Court of Criminal Appeals of Alabama in *Williams v. State*, 184 So. 3d 1064, (Ala. Crim. App. 2015), concluded that 13A-6-65(a)(3) was unconstitutional as it applied to *Williams* in light of the *Lawrence* holding. See also *Wesson v. State*, (CR-13-0960, July 2, 2015) — So. 3d —, 2015 WL 4066690 (Ala. Crim. App. 2015) (insufficient evidence that Wesson engaged in consensual deviate sexual intercourse).]

Deviate sexual intercourse means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another. [13A-6-60(2)] **[Note:** The "marital exemption" for the offense of forced sodomy contained in the statutory definition of deviate sexual intercourse (13A-6-60(2)) was declared unconstitutional and was severed from the definition in *Williams v. State*, 494 So. 2d 819 (Ala. Crim. App. 1986). In footnote 6 the court stated, "Our decision today is limited to the forcible sodomy statute since only the constitutionality of this statute is before us. However, our reasoning may well apply to other offenses." There remains a question whether the marital exemption should be included.]

If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of sexual misconduct, then you shall find the defendant guilty of sexual misconduct.

If you find that the State has failed to prove any one or more of the elements of the offense of sexual misconduct, then you cannot find the defendant guilty of sexual misconduct.

[If lesser-included offenses are included, the Court should instruct on those offenses at this point.]

Use Notes

The statute does not state a specific mens rea element. The Court of Criminal Appeals has concluded that "intent" is not an element of sodomy or sexual abuse. *Allen v. State*, 624 So. 2d 650 (Ala. Crim. App. 1993). Moreover, in interpreting the rape in the first degree statute which also does not establish a specific mens rea element, the courts have concluded that rape in the first degree does not include "specific intent" as an element. *Anonymous v. State*, 507 So.2d 972 (Ala. 1987); *Toler v. State*, 623 So. 2d 408 (Ala. Crim. App.), cert. denied, No. 1921231 (Ala. 1993).

Insert the appropriate mens rea element considering the indictment and the evidence before the court. There are few, if any, strict liability offenses in the Code. See Commentary for 13A-2-3 and 13A-2-4(b). There are four mens rea elements in the Alabama Code: intentionally, knowingly, recklessly and with criminal negligence. See 13A-2-2.

1. A person acts *intentionally* with respect to a result or to conduct described by a statute defining an offense when his/her purpose is to cause that result or to engage in that conduct. [13A-2-2(1)]
2. A person acts *knowingly* with respect to conduct or to a circumstance described by a statute defining an offense he/she is aware that his/her conduct is of that nature or that the circumstance exists. [13A-2-2(2)]
3. A person acts *recklessly* with respect to a result or to a circumstance when he/she is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. [13A-2-2(3)]
4. A person acts with *criminal negligence* with respect to a result or to a circumstance when he/she fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a

gross deviation from the standard of care that a reasonable person would observe in the situation. A court or jury may consider statutes or ordinances regulating the defendant's conduct as bearing upon the question of criminal negligence. [13A-2-2(4)]

It may be necessary to charge the jury on sodomy in the first or second degree if (1) this instruction is being used as a lesser included offense instruction, or (2) the distinction between the charges must be made to clear up confusion. Deviate sexual intercourse is sexual misconduct unless additional factors enhance the charge. For example, in the case of a charge of sexual misconduct and a defense of alibi, there is no need to mention sodomy when explaining sexual misconduct.

[Approved 9-2-15.]