

HABITUAL VIOLENT OFFENDER DEFINITIONS

1998 GENERAL SESSION

STATE OF UTAH

Sponsor: Neal B. Hendrickson

AN ACT RELATING TO THE CRIMINAL CODE; AMENDING THE HABITUAL VIOLENT OFFENDER SECTION BY PROVIDING THAT FELONY ATTEMPTS TO COMMIT SPECIFIED VIOLENT OFFENSES ARE VIOLENT FELONIES UNDER THE HABITUAL VIOLENT OFFENDER STATUTE; CLARIFYING THE DEFINITION OF EXTORTION AS A VIOLENT FELONY; AND ADDING THE POSSESSION OF A DANGEROUS WEAPON OR A HANDGUN BY A RESTRICTED PERSON AS A VIOLENT FELONY.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

76-3-203.5, as enacted by Chapter 284, Laws of Utah 1995

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-3-203.5** is amended to read:

76-3-203.5. Habitual violent offender -- Definition -- Procedure -- Penalty.

(1) As [provided] used in this section:

(a) "Felony" means any offense against a criminal statute of the state, any other state, the United States, or any district, possession, or territory of the United States for which the maximum punishment the offender may be subjected to exceeds one year in prison.

(b) "Habitual violent offender" means a person convicted within the state of any violent felony and who, on at least two previous occasions as provided in Subsection (2), has been convicted of a violent felony and committed to either prison in Utah or an equivalent correctional institution of another state or of the United States either at initial sentencing or after revocation of probation.

(c) (i) "Violent felony" means any [~~felony violation~~] of the following offenses, or any attempt, solicitation, or conspiracy to commit any of these offenses punishable as a felony:

(A) aggravated arson, arson, knowingly causing a catastrophe, and criminal mischief under Title 76, Chapter 6, Part 1, Property Destruction;

- (B) aggravated assault under Title 76, Chapter 5, Part 1, Assault and Related Offenses;
- (C) criminal homicide offenses under Title 76, Chapter 5, Part 2, Criminal Homicide;
- (D) aggravated kidnapping and kidnapping under Title 76, Chapter 5, Part 3, Kidnaping;
- (E) rape, Section 76-5-402;
- (F) rape of a child, Section 76-5-402.1;
- (G) object rape, Section 76-5-402.2;
- (H) object rape of a child, Section 76-5-402.3;
- (I) forcible sodomy, Section 76-5-403;
- (J) sodomy on a child, Section 76-5-403.1;
- (K) forcible sexual abuse, Section 76-5-404;
- (L) aggravated sexual abuse of a child and sexual abuse of a child, Section 76-5-404.1;
- (M) aggravated sexual assault, Section 76-5-405;
- (N) sexual exploitation of a minor, Section 76-5a-3;
- (O) aggravated burglary and burglary of a dwelling under Title 76, Chapter 6, Part 2,

Burglary and Criminal Trespass;

- (P) aggravated robbery and robbery under Title 76, Chapter 6, Part 3, Robbery;
- (Q) theft by extortion under Subsections 76-6-406(2)(a) or (b);
- (R) tampering with a witness under Subsection 76-8-508(2)(c);
- ~~(R)~~ (S) tampering with a juror under Subsection 76-8-508.5(2)(c);
- ~~(S)~~ (T) extortion to dismiss a criminal proceeding under Section 76-8-509 if by any threat or by use of force theft by extortion has been committed pursuant to Subsections 76-6-406(2)(a), (b), and (i);
- ~~(T)~~ (U) damage or destruction of school or institution of higher education property by explosives or flammable materials under Section 76-8-715;
- ~~(U)~~ (V) possession, use, or removal of explosive, chemical, or incendiary devices under Subsections 76-10-306(3) through (6);
- ~~(V)~~ (W) unlawful delivery of explosive, chemical, or incendiary devices under Section 76-10-307;

(X) purchase or possession of a dangerous weapon or handgun by a restricted person under Section 76-10-503;

~~[(W)]~~ (Y) unlawful discharge of a firearm under Section 76-10-508;

~~[(X)]~~ (Z) aggravated exploitation of prostitution under Subsection 76-10-1306(1)(a);

~~[(Y)]~~ (AA) bus hijacking under Section 76-10-1504; and

~~[(Z)]~~ (BB) bombing or placing a bomb or explosive in, upon, or near a terminal or bus under Section 76-10-1505;

(ii) any felony offense against a criminal statute of any other state, the United States, or any district, possession, or territory of the United States which would constitute a violent felony as defined in this subsection if committed in this state.

(2) (a) The penalty enhancement provisions of this section apply, if during the ten years immediately preceding the commission of the violent felony, the person has been:

- (i) convicted of any felony;
- (ii) incarcerated, on parole, or on probation for any felony; or
- (iii) the subject of an unexecuted felony arrest warrant.

(b) The provisions of Subsection (2)(a) include any conviction, incarceration, parole, probation, escape, absconction, and arrest warrant under the laws of this state, any other state, the United States, or any district, possession, or territory of the United States.

(3) If a person is convicted in this state of a violent felony by plea or by verdict and the sentencing court determines the person is a habitual violent offender under this section, the penalty for a:

- (a) third degree felony shall be as if the conviction were for a first degree felony;
- (b) second degree felony shall be as if the conviction were for a first degree felony; or
- (c) first degree felony shall remain the penalty for a first degree penalty except:
 - (i) the convicted person is not eligible for probation; and
 - (ii) the Board of Pardons and Parole shall consider that the convicted person is a habitual violent offender as an aggravating factor to determine the length of incarceration.

(4) (a) In all cases, notice that the prosecution intends to seek punishment as a habitual

violent offender under this section shall be provided in writing and shall be served upon the defendant or his attorney not later than ten days prior to trial. Notice shall include the case number, court, and date of conviction or commitment of any case relied upon by the prosecution.

(b) (i) The defendant shall serve notice in writing upon the prosecutor if the defendant intends to deny that:

- (A) the defendant is the person who was convicted or committed;
- (B) the defendant was represented by counsel or had waived counsel; or
- (C) the defendant's plea was understandingly or voluntarily entered.

(ii) The notice of denial shall be served not later than five days prior to trial and shall state in detail the defendant's contention regarding the previous conviction and commitment.

(c) The court shall determine if this section applies prior to or at the time of sentencing. The court shall consider any evidence presented at trial and shall afford the prosecution and the defendant an opportunity to present any necessary additional evidence. Prior to sentencing under this section, the court shall determine whether this section is applicable by a preponderance of the evidence.

(d) If any previous conviction and commitment is based upon a plea of guilty or no contest, there is a rebuttable presumption that the conviction and commitment were regular and lawful in all respects if the conviction and commitment occurred after January 1, 1970. If the conviction and commitment occurred prior to January 1, 1970, the burden is on the prosecution to establish by a preponderance of the evidence that the defendant was then represented by counsel or had lawfully waived his right to have counsel present, and that his plea was understandingly and voluntarily entered.

(e) If the court finds this section applicable, it shall enter that specific finding on the record and shall indicate in the order of judgment and commitment that the defendant has been found by the court to be a habitual violent offender and is sentenced under this section.

(5) The habitual violent offender provisions of this section are not an element of the offense, and proof of a defendant's conduct as a habitual violent offender is not necessary at a preliminary hearing or at trial.

(6) (a) The sentencing enhancement provisions of Sections 76-3-407 and 76-3-408 shall apply to a felony conviction defined in Title 76, Chapter 5, Part 4, Sexual Offenses, and shall supersede the provisions of this section.

(b) Notwithstanding Subsection (6)(a):

(i) the convictions under Sections 76-5-404 and 76-5a-3 shall be governed by the enhancement provisions of this section; and

(ii) the "violent felony" offense defined in Subsection (1)(c) shall include any felony sexual offense violation of Title 76, Chapter 5, Part 4, Sexual Offenses, to determine if the convicted person is a habitual violent offender.