

HABITUAL VIOLENT OFFENDERS

AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Paul Ray

Senate Sponsor: Sheldon L. Killpack

LONG TITLE

General Description:

This bill provides specific references to offenses to be included in the definition of a violent felony under the Criminal Code.

Highlighted Provisions:

This bill:

- ▶ adds listed offenses to the definition of a violent felony, including:
 - mayhem;
 - stalking;
 - terroristic threat; and
 - child abuse;
 - ▶ removes requirement that proof of defendant's conduct as a habitual violent offender be provided at the preliminary hearing or at the trial as an element of the offense;
- and
- ▶ amends provisions regarding notice to the defendant that the defendant is subject to punishment as a habitual violent offender.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

Utah Code Sections Affected:

AMENDS:

76-1-302, as last amended by Chapter 61, Laws of Utah 2003

76-3-203.5, as last amended by Chapter 140, Laws of Utah 2004

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

Section 1. Section **76-1-302** is amended to read:

76-1-302. Time limitations for prosecution of offenses -- Provisions if DNA evidence would identify the defendant -- Commencement of prosecution.

(1) Except as otherwise provided, a prosecution for:

(a) a felony or negligent homicide shall be commenced within four years after it is committed;

(b) a misdemeanor other than negligent homicide shall be commenced within two years after it is committed; and

(c) any infraction shall be commenced within one year after it is committed.

(2) (a) A prosecution for the offenses listed in Subsections 76-3-203.5(1)(c)(i)(A) through [(P)] (AA) may be commenced at any time if the identity of the person who committed the crime is unknown but DNA evidence is collected that would identify the person at a later date.

(b) Subsection (2)(a) does not apply if the statute of limitations on a crime has run as of May 5, 2003, and no charges have been filed.

(3) If the statute of limitations would have run but for the provisions of Subsection (2) and identification of a perpetrator is made through DNA, a prosecution shall be commenced within one year of the discovery of the identity of the perpetrator.

(4) A prosecution is commenced upon the finding and filing of an indictment by a grand jury or upon the filing of a complaint or information.

Section 2. Section **76-3-203.5** is amended to read:

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

(1) As used in this section:

(a) "Felony" means any [~~offense against~~] violation of 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 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 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~~] assault by prisoner, Section 76-5-102.5;

(C) disarming a police officer, Section 76-5-102.8;

(D) aggravated assault, Section 76-5-103;

(E) aggravated assault by prisoner, Section 76-5-103.5;

(F) mayhem, Section 76-5-105;

(G) stalking, Subsection 76-5-106.5(6);

(H) terroristic threat, Section 76-5-107;

(I) child abuse, Subsections 76-5-109(2)(a) and (b);

(J) commission of domestic violence in the presence of a child, Section 76-5-109.1;

(K) abuse or neglect of disabled child, Section 76-5-110;

(L) abuse, neglect, or exploitation of a vulnerable adult, Section 76-5-111;

(M) endangerment of child or elder adult, Section 76-5-112.5;

[~~(N)~~] (N) criminal homicide offenses under Title 76, Chapter 5, Part 2, Criminal Homicide;

[~~(O)~~] (O) kidnapping, child kidnapping, and aggravated kidnapping [and kidnapping] under Title 76, Chapter 5, Part 3, Kidnapping;

[~~(P)~~] (P) rape, Section 76-5-402;

- ~~[(F)]~~ (Q) rape of a child, Section 76-5-402.1;
- ~~[(G)]~~ (R) object rape, Section 76-5-402.2;
- ~~[(H)]~~ (S) object rape of a child, Section 76-5-402.3;
- ~~[(I)]~~ (T) forcible sodomy, Section 76-5-403;
- ~~[(J)]~~ (U) sodomy on a child, Section 76-5-403.1;
- ~~[(K)]~~ (V) forcible sexual abuse, Section 76-5-404;
- ~~[(L)]~~ (W) aggravated sexual abuse of a child and sexual abuse of a child, Section 76-5-404.1;
- ~~[(M)]~~ (X) aggravated sexual assault, Section 76-5-405;
- ~~[(N)]~~ (Y) sexual exploitation of a minor, Section 76-5a-3;
- ~~[(O)]~~ (Z) aggravated burglary and burglary of a dwelling under Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass;
- ~~[(P)]~~ (AA) aggravated robbery and robbery under Title 76, Chapter 6, Part 3, Robbery;
- ~~[(Q)]~~ (BB) theft by extortion under Subsection 76-6-406(2)(a) or (b);
- ~~[(R)]~~ (CC) tampering with a witness under Subsection 76-8-508(1);
- ~~[(S)]~~ (DD) retaliation against a witness, victim, or informant under Section 76-8-508.3;
- ~~[(T)]~~ (EE) tampering with a juror under Subsection 76-8-508.5(2)(c);
- ~~[(U)]~~ (FF) 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);
- ~~[(V)]~~ (GG) damage or destruction of school or institution of higher education property by explosives or flammable materials under Section 76-8-715;
- ~~[(W)]~~ (HH) possession, use, or removal of explosive, chemical, or incendiary devices under Subsections 76-10-306(3) through (6);
- ~~[(X)]~~ (II) unlawful delivery of explosive, chemical, or incendiary devices under Section 76-10-307;
- ~~[(Y)]~~ (JJ) purchase or possession of a dangerous weapon or handgun by a restricted person under Section 76-10-503;

~~[(Z)]~~ (KK) unlawful discharge of a firearm under Section 76-10-508;
~~[(AA)]~~ (LL) aggravated exploitation of prostitution under Subsection 76-10-1306(1)(a);
~~[(BB)]~~ (MM) bus hijacking under Section 76-10-1504; and
~~[(CC)]~~ (NN) discharging firearms and hurling missiles under Section 76-10-1505; or
(ii) any felony ~~[offense against]~~ violation of 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 (1) if committed in this state.

(2) If a person is convicted in this state of a violent felony by plea or by verdict and the trier of fact determines beyond a reasonable doubt that the person is a habitual violent offender under this section, the penalty for a:

- (a) third degree felony is as if the conviction were for a first degree felony;
- (b) second degree felony is as if the conviction were for a first degree felony; or
- (c) first degree felony remains 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]~~ in determining the length of incarceration.

(3) (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.]~~ The prosecuting attorney, or grand jury if an indictment is returned, shall provide notice in the information or indictment that the defendant is subject to punishment as a habitual violent offender under this section. 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.

(4) (a) If the defendant enters a denial under Subsection (3)(b) and if the case is tried to a jury, the jury may not be told until after it returns its verdict on the underlying felony charge, of the:

(i) defendant's previous convictions for violent felonies, except as otherwise provided in the Utah Rules of Evidence; or

(ii) allegation against the defendant of being a habitual violent offender.

(b) If the jury's verdict is guilty, the defendant shall be tried regarding the allegation of being an habitual violent offender by the same jury, if practicable, unless the defendant waives the jury, in which case the allegation shall be tried immediately to the court.

(c) (i) Prior to or at the time of sentencing the trier of fact shall determine if this section applies.

(ii) The trier of fact shall consider any evidence presented at trial and the prosecution and the defendant shall be afforded an opportunity to present any necessary additional evidence.

(iii) Prior to sentencing under this section, the trier of fact shall determine whether this section is applicable beyond a reasonable doubt.

(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 trier of fact finds this section applicable, the court 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 trier of fact to be a habitual violent offender and is sentenced

under this section.

~~[(5) The habitual violent offender provisions of this section are an element of the offense, and proof of a defendant's conduct as a habitual violent offender is necessary at a preliminary hearing or at trial.]~~

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

(b) Notwithstanding Subsection [(6)] (5)(a):

(i) the convictions under Sections 76-5-404 and 76-5a-3 are 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.

Section 3. Effective date.

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.