

**INCREASED PENALTY FOR SECOND
CONVICTION FOR CERTAIN SEXUAL
OFFENSES AGAINST A CHILD**

2007 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Carl Wimmer

Senate Sponsor: _____

LONG TITLE

General Description:

This bill amends the Utah Criminal Code to provide that a person who is convicted a second time for certain types of sexual offenses against a child shall be sentenced for a capital felony.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ amends provisions related to repeat and habitual sex offenders to provide for life imprisonment without parole upon conviction of a second offense;
- ▶ provides that a person convicted of a grievous sexual offense against a child shall be sentenced for a capital felony if, prior to the commission of the offense, the person was convicted of, and committed for, a grievous sexual offense against a child;
- ▶ requires a prosecuting attorney to provide notice that the defendant is subject to be sentenced for a capital felony;
- ▶ requires the defendant to provide notice of intent to dispute a prior conviction or commitment;
- ▶ describes procedures and requirements for a trier of fact to determine whether the defendant is subject to sentencing for a capital felony as provided in this bill; and



28 ▶ makes technical changes.

29 **Monies Appropriated in this Bill:**

30 None

31 **Other Special Clauses:**

32 None

33 **Utah Code Sections Affected:**

34 AMENDS:

35 **76-3-201**, as last amended by Chapter 208, Laws of Utah 2006

36 **76-3-203.5**, as last amended by Chapter 59, Laws of Utah 2005

37 **76-3-407**, as last amended by Chapter 208, Laws of Utah 2006

38 **76-3-408**, as last amended by Chapter 18, Laws of Utah 1984

39 ENACTS:

40 **76-3-410**, Utah Code Annotated 1953



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

43 Section 1. Section **76-3-201** is amended to read:

44 **76-3-201. Definitions -- Sentences or combination of sentences allowed -- Civil**
45 **penalties -- Hearing.**

46 (1) As used in this section:

47 (a) "Conviction" includes a:

48 (i) judgment of guilt; and

49 (ii) plea of guilty.

50 (b) "Criminal activities" means any offense of which the defendant is convicted or any
51 other criminal conduct for which the defendant admits responsibility to the sentencing court
52 with or without an admission of committing the criminal conduct.

53 (c) "Pecuniary damages" means all special damages, but not general damages, which a
54 person could recover against the defendant in a civil action arising out of the facts or events
55 constituting the defendant's criminal activities and includes the money equivalent of property
56 taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical
57 expenses.

58 (d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a

59 victim, and payment for expenses to a governmental entity for extradition or transportation and
60 as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

61 (e) (i) "Victim" means any person who the court determines has suffered pecuniary
62 damages as a result of the defendant's criminal activities.

63 (ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

64 (2) Within the limits prescribed by this chapter, a court may sentence a person
65 convicted of an offense to any one of the following sentences or combination of them:

66 (a) to pay a fine;

67 (b) to removal or disqualification from public or private office;

68 (c) to probation unless otherwise specifically provided by law;

69 (d) to imprisonment;

70 (e) on or after April 27, 1992, to life in prison without parole; or

71 (f) to death.

72 (3) (a) This chapter does not deprive a court of authority conferred by law to:

73 (i) forfeit property;

74 (ii) dissolve a corporation;

75 (iii) suspend or cancel a license;

76 (iv) permit removal of a person from office;

77 (v) cite for contempt; or

78 (vi) impose any other civil penalty.

79 (b) A civil penalty may be included in a sentence.

80 (4) (a) When a person is convicted of criminal activity that has resulted in pecuniary
81 damages, in addition to any other sentence it may impose, the court shall order that the
82 defendant make restitution to the victims, or for conduct for which the defendant has agreed to
83 make restitution as part of a plea agreement.

84 (b) In determining whether restitution is appropriate, the court shall follow the criteria
85 and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

86 (5) (a) In addition to any other sentence the court may impose, the court shall order the
87 defendant to pay restitution of governmental transportation expenses if the defendant was:

88 (i) transported pursuant to court order from one county to another within the state at
89 governmental expense to resolve pending criminal charges;

90 (ii) charged with a felony or a class A, B, or C misdemeanor; and

91 (iii) convicted of a crime.

92 (b) The court may not order the defendant to pay restitution of governmental
93 transportation expenses if any of the following apply:

94 (i) the defendant is charged with an infraction or on a subsequent failure to appear a
95 warrant is issued for an infraction; or

96 (ii) the defendant was not transported pursuant to a court order.

97 (c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i)
98 shall be calculated according to the following schedule:

99 (A) \$75 for up to 100 miles a defendant is transported;

100 (B) \$125 for 100 up to 200 miles a defendant is transported; and

101 (C) \$250 for 200 miles or more a defendant is transported.

102 (ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant
103 transported regardless of the number of defendants actually transported in a single trip.

104 (d) If a defendant has been extradited to this state under Title 77, Chapter 30,
105 Extradition, to resolve pending criminal charges and is convicted of criminal activity in the
106 county to which he has been returned, the court may, in addition to any other sentence it may
107 impose, order that the defendant make restitution for costs expended by any governmental
108 entity for the extradition.

109 (6) (a) In addition to any other sentence the court may impose, the court shall order the
110 defendant to pay court-ordered restitution to the county for the cost of incarceration in the
111 county correctional facility before and after sentencing if:

112 (i) the defendant is convicted of criminal activity that results in incarceration in the
113 county correctional facility; and

114 (ii) (A) the defendant is not a state prisoner housed in a county correctional facility
115 through a contract with the Department of Corrections; or

116 (B) the reimbursement does not duplicate the reimbursement provided under Section
117 64-13c-301 if the defendant is a state prisoner housed in a county correctional facility as a
118 condition of probation under Subsection 77-18-1(8).

119 (b) (i) The costs of incarceration under Subsection (6)(a) are:

120 (A) the daily core inmate incarceration costs and medical and transportation costs

121 established under Section 64-13c-302; and

122 (B) the costs of transportation services and medical care that exceed the negotiated
123 reimbursement rate established under Subsection 64-13c-302(2).

124 (ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred
125 by the county correctional facility in providing reasonable accommodation for an inmate
126 qualifying as an individual with a disability as defined and covered by the federal Americans
127 with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental
128 health treatment for the inmate's disability.

129 (c) In determining the monetary sum and other conditions for the court-ordered
130 restitution under this Subsection (6), the court shall consider the criteria provided under
131 Subsections 77-38a-302(5)(c)(i) through (iv).

132 (d) If on appeal the defendant is found not guilty of the criminal activity under
133 Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall
134 reimburse the defendant for restitution the defendant paid for costs of incarceration under
135 Subsection (6)(a).

136 (7) (a) If a statute under which the defendant was convicted mandates that one of three
137 stated minimum terms shall be imposed, the court shall order imposition of the term of middle
138 severity unless there are circumstances in aggravation or mitigation of the crime, except as
139 provided in Subsection (8).

140 (b) Prior to or at the time of sentencing, either party may submit a statement identifying
141 circumstances in aggravation or mitigation or presenting additional facts. If the statement is in
142 writing, it shall be filed with the court and served on the opposing party at least four days prior
143 to the time set for sentencing.

144 (c) In determining whether there are circumstances that justify imposition of the
145 highest or lowest term, the court may consider the record in the case, the probation officer's
146 report, other reports, including reports received under Section 76-3-404, statements in
147 aggravation or mitigation submitted by the prosecution or the defendant, and any further
148 evidence introduced at the sentencing hearing.

149 (d) The court shall set forth on the record the facts supporting and reasons for imposing
150 the upper or lower term.

151 (e) In determining a just sentence, the court shall consider sentencing guidelines

152 regarding aggravating and mitigating circumstances promulgated by the Sentencing
153 Commission.

154 (8) (a) The defendant shall be sentenced to the highest minimum term in prison if the
155 trier of fact finds that:

156 (i) during the commission of any of the following offenses the defendant causes
157 substantial bodily injury to the child:

158 (A) Section 76-5-301.1, child kidnapping;

159 (B) Section 76-5-402.1, rape of a child;

160 (C) Section 76-5-402.3, object rape of a child; or

161 (D) Section 76-5-403.1, sodomy on a child; or

162 (ii) at the time of the commission of any of the offenses in Subsections (8)(a)(i)(A)
163 through (D), the defendant had been previously convicted of:

164 (A) Section 76-5-402, rape;

165 (B) Section 76-5-402.1, rape of a child;

166 (C) Section 76-5-402.2, object rape;

167 (D) Section 76-5-402.3, object rape of a child;

168 (E) Subsection 76-5-403(2), forcible sodomy;

169 (F) Section 76-5-403.1, sodomy on a child;

170 (G) Section 76-5-404, forcible sexual abuse;

171 (H) Section 76-5-404.1, sexual abuse of a child and aggravated sexual abuse of a child;

172 (I) Section 76-5-405, aggravated sexual assault;

173 (J) any offense in any other state or federal jurisdiction which constitutes or would
174 constitute a crime in Subsections (8)(a)(ii)(A) through (I); or

175 (K) the attempt to commit any of the offenses in Subsections (8)(a)(ii)(A) through (J).

176 (b) This Subsection (8) takes precedence over any conflicting provision of law, except
177 Section 76-3-410.

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

179 **76-3-203.5. Habitual violent offender -- Definition -- Procedure -- Penalty.**

180 (1) As used in this section:

181 (a) "Felony" means any violation of a criminal statute of the state, any other state, the
182 United States, or any district, possession, or territory of the United States for which the

183 maximum punishment the offender may be subjected to exceeds one year in prison.

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

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

190 (A) aggravated arson, arson, knowingly causing a catastrophe, and criminal mischief,

191 Title 76, Chapter 6, Part 1, Property Destruction;

192 (B) assault by prisoner, Section 76-5-102.5;

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

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

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

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

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

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

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

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

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

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

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

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

205 (O) kidnapping, child kidnapping, and aggravated kidnapping under Title 76, Chapter
206 5, Part 3, Kidnapping;

207 (P) rape, Section 76-5-402;

208 (Q) rape of a child, Section 76-5-402.1;

209 (R) object rape, Section 76-5-402.2;

210 (S) object rape of a child, Section 76-5-402.3;

211 (T) forcible sodomy, Section 76-5-403;

212 (U) sodomy on a child, Section 76-5-403.1;

213 (V) forcible sexual abuse, Section 76-5-404;

214 (W) aggravated sexual abuse of a child and sexual abuse of a child, Section
215 76-5-404.1;

216 (X) aggravated sexual assault, Section 76-5-405;

217 (Y) sexual exploitation of a minor, Section 76-5a-3;

218 (Z) aggravated burglary and burglary of a dwelling under Title 76, Chapter 6, Part 2,
219 Burglary and Criminal Trespass;

220 (AA) aggravated robbery and robbery under Title 76, Chapter 6, Part 3, Robbery;

221 (BB) theft by extortion under Subsection 76-6-406(2)(a) or (b);

222 (CC) tampering with a witness under Subsection 76-8-508(1);

223 (DD) retaliation against a witness, victim, or informant under Section 76-8-508.3;

224 (EE) tampering with a juror under Subsection 76-8-508.5(2)(c);

225 (FF) extortion to dismiss a criminal proceeding under Section 76-8-509 if by any threat
226 or by use of force theft by extortion has been committed pursuant to Subsections
227 76-6-406(2)(a), (b), and (i);

228 (GG) damage or destruction of school or institution of higher education property by
229 explosives or flammable materials under Section 76-8-715;

230 (HH) possession, use, or removal of explosive, chemical, or incendiary devices under
231 Subsections 76-10-306(3) through (6);

232 (II) unlawful delivery of explosive, chemical, or incendiary devices under Section
233 76-10-307;

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

236 (KK) unlawful discharge of a firearm under Section 76-10-508;

237 (LL) aggravated exploitation of prostitution under Subsection 76-10-1306(1)(a);

238 (MM) bus hijacking under Section 76-10-1504; and

239 (NN) discharging firearms and hurling missiles under Section 76-10-1505; or

240 (ii) any felony violation of a criminal statute of any other state, the United States, or
241 any district, possession, or territory of the United States which would constitute a violent
242 felony as defined in this Subsection (1) if committed in this state.

243 (2) If a person is convicted in this state of a violent felony by plea or by verdict and the
244 trier of fact determines beyond a reasonable doubt that the person is a habitual violent offender

245 under this section, the penalty for a:

246 (a) third degree felony is as if the conviction were for a first degree felony;

247 (b) second degree felony is as if the conviction were for a first degree felony; or

248 (c) first degree felony remains the penalty for a first degree penalty except:

249 (i) the convicted person is not eligible for probation; and

250 (ii) the Board of Pardons and Parole shall consider that the convicted person is a
251 habitual violent offender as an aggravating factor in determining the length of incarceration.

252 (3) (a) The prosecuting attorney, or grand jury if an indictment is returned, shall
253 provide notice in the information or indictment that the defendant is subject to punishment as a
254 habitual violent offender under this section. Notice shall include the case number, court, and
255 date of conviction or commitment of any case relied upon by the prosecution.

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

258 (A) the defendant is the person who was convicted or committed;

259 (B) the defendant was represented by counsel or had waived counsel; or

260 (C) the defendant's plea was understandingly or voluntarily entered.

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

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

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

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

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

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

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

276 evidence.

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

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

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

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

293 (b) Notwithstanding Subsection (5)(a):

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

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

299 (c) The sentencing enhancement described in Section 76-3-410 supercedes the
300 provisions of this section.

301 Section 3. Section **76-3-407** is amended to read:

302 **76-3-407. Repeat and habitual sex offenders -- Additional prison term for prior**
303 **felony convictions.**

304 (1) If the new offense is the commission of or the attempt to commit a first or second
305 degree felony under Title 76, Chapter 5, Part 4, Sexual Offenses, the court shall impose, in
306 addition to and consecutive to any other prison term, an additional five-year term for each prior

307 conviction for a felony sexual offense in Utah or an offense in any other state or federal
308 jurisdiction which constitutes or would constitute a crime or an attempted crime which, if
309 committed in Utah, would be punishable under Title 76, Chapter 5, Part 4, Sexual Offenses, if
310 the trier of fact finds the prior felony conviction was entered before the commission of the new
311 offense.

312 (2) This section supercedes any other provision of law except Section 76-3-408 and
313 Section 76-3-410.

314 Section 4. Section **76-3-408** is amended to read:

315 **76-3-408. Repeat and habitual sex offenders -- Life imprisonment without parole**
316 **on second conviction.**

317 (1) Notwithstanding any other provision of law, except as provided in Section
318 76-3-410, a person who has been convicted in [~~two~~] one or more separate prosecutions of any
319 sexual offense which, if committed in Utah or any other state or federal jurisdiction, would
320 contain elements sufficient to constitute any of the offenses described in Sections 76-5-402,
321 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403, 76-5-403.1, 76-5-404, 76-5-404.1, and
322 76-5-405, shall, upon a subsequent conviction of any offense set forth in this section, be
323 sentenced to a term of imprisonment for life without the possibility of parole if the existence of
324 the prior felony conviction or convictions has been charged and admitted or found true in the
325 action for the new offense and if the prior felony conviction or convictions were entered before
326 the commission of the new offense.

327 (2) A prior felony conviction can be alleged for purposes of this section only if it was
328 entered before the actual commission of the crime which constitutes the basis for the next
329 felony conviction, subsequently entered against the accused, which is also alleged under this
330 section.

331 Section 5. Section **76-3-410** is enacted to read:

332 **76-3-410. Second conviction for a grievous sexual offense against a child**
333 **punishable as a capital felony.**

334 (1) For purposes of this section:

335 (a) "Committed to prison" means committed, either at initial sentencing or after
336 revocation of probation, to:

337 (i) a prison in Utah; or

338 (ii) an equivalent correctional institution of another state or the United States.
339 (b) "Grievous sexual offense against a child" means:
340 (i) rape of a child, as described in Section 76-5-402.1;
341 (ii) object rape of a child, as described in Section 76-5-402.3;
342 (iii) sodomy on a child, as described in Section 76-5-403.1; or
343 (iv) aggravated sexual abuse of a child, as described in Section 76-5-404.1.
344 (2) Notwithstanding any other provision of law, a person convicted of a grievous
345 sexual offense against a child shall be sentenced for a capital felony, pursuant to the provisions
346 of Sections 76-3-206 and 76-3-207, if the trier of fact determines beyond a reasonable doubt
347 that:
348 (a) the conviction is for conduct committed on or after April 30, 2007; and
349 (b) prior to the conduct described in Subsection (2)(a), the person was convicted of,
350 and committed to prison for:
351 (i) a grievous sexual offense against a child; or
352 (ii) an offense in any state, district, territory, or possession of the United States that, if
353 committed in this state, would constitute a grievous sexual offense against a child.
354 (3) (a) The prosecuting attorney, or grand jury if an indictment is returned, shall
355 provide notice in the information or indictment that the defendant is subject to be sentenced for
356 a capital felony.
357 (b) The notice described in Subsection (3)(a) shall include the case number, court, and
358 date of conviction or commitment to prison of any case relied upon by the prosecution.
359 (4) (a) The defendant shall serve notice in writing upon the prosecutor if the defendant
360 intends to deny that:
361 (i) the defendant is the person who was convicted of, or committed to prison for, the
362 offense described in Subsection (2)(b);
363 (ii) the defendant was represented by counsel or had waived counsel; or
364 (iii) the defendant's plea was understandingly or voluntarily entered.
365 (b) The notice of denial described in Subsection (4)(a) shall:
366 (i) be served not later than five days prior to trial; and
367 (ii) state in detail the defendant's contention regarding the previous conviction and
368 commitment to prison.

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

371 (i) defendant's previous convictions described in Subsection (2)(b), except as otherwise
372 provided in the Utah Rules of Evidence; or

373 (ii) allegation against the defendant that the defendant was previously convicted of an
374 offense described in Subsection (2)(b).

375 (b) If the jury's verdict is guilty, the defendant shall be tried regarding the allegation
376 that the defendant was convicted of, and committed to prison for, an offense described in
377 Subsection (2)(b) by the same jury, if practicable, unless the defendant waives the jury, in
378 which case the allegation shall be tried immediately to the court.

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

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

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

386 (d) (i) If a conviction and commitment to prison described in Subsection (2)(b) is based
387 upon a plea of guilty or no contest, there is a rebuttable presumption that the conviction and
388 commitment to prison were regular and lawful in all respects if the conviction and commitment
389 to prison occurred after January 1, 1970.

390 (ii) If the conviction and commitment to prison described in Subsection (2)(b) occurred
391 prior to January 1, 1970, the burden is on the prosecution to establish by a preponderance of the
392 evidence that the defendant was then represented by counsel or had lawfully waived the right to
393 have counsel present, and that the defendant's plea was understandingly and voluntarily
394 entered.

395 (e) If the trier of fact finds this section applicable, the court shall enter that specific
396 finding on the record and shall indicate in the order of judgment and commitment that the
397 defendant has been found by the trier of fact to be subject to the sentencing provisions of this
398 section.

Legislative Review Note
as of 1-3-07 7:13 PM

Office of Legislative Research and General Counsel