

Representative Carl Wimmer proposes the following substitute bill:

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

4 2007 GENERAL SESSION

5 STATE OF UTAH

6 **Chief Sponsor: Carl Wimmer**

7 Senate Sponsor: D. Chris Buttar

8
9 **LONG TITLE**

10 **General Description:**

11 This bill amends the Utah Criminal Code to provide that a person who is convicted a
12 second time for certain types of sexual offenses against a child may be sentenced for a
13 capital felony or life in prison without parole.

14 **Highlighted Provisions:**

15 This bill:

- 16 ▶ defines terms;
- 17 ▶ modifies provisions related to sentencing if the Utah State Supreme Court or the
18 United States Supreme Court holds the death penalty to be unconstitutional as it
19 relates to a particular capital offense;
- 20 ▶ describes some of the aggravating and mitigating circumstances that a trier of fact
21 may consider in determining whether a defendant should receive the death penalty
22 for a capital second grievous sexual offense against a child;
- 23 ▶ amends provisions related to repeat and habitual sex offenders to provide for life
24 imprisonment without parole upon conviction of a second offense;
- 25 ▶ provides that an adult convicted of a grievous sexual offense against a child shall be



26 sentenced for a capital felony if:

27 • prior to the commission of the offense, the person was convicted of, and
28 committed to prison for, a grievous sexual offense against a child; and

29 • the prosecutor files a notice of intent to seek the death penalty;

30 ▶ provides that an adult convicted of a grievous sexual offense against a child shall be
31 sentenced to life in prison without parole if:

32 • prior to the commission of the offense, the person was convicted of, and
33 committed to prison for, a grievous sexual offense against a child; and

34 • the prosecutor has not filed a notice of intent to seek the death penalty;

35 ▶ requires the prosecuting attorney to provide notice that the defendant is subject to be
36 sentenced for a capital felony, if the prosecutor files a notice of intent to seek the
37 death penalty;

38 ▶ provides that the court may not accept a plea of guilty for a noncapital first degree
39 felony second grievous sexual offense against a child before expiration of the time
40 that the prosecution may file notice of intent to seek the death penalty, unless the
41 prosecutor consents to acceptance of the plea;

42 ▶ requires the defendant to provide notice of intent to dispute a prior conviction or
43 commitment;

44 ▶ describes procedures and requirements for a trier of fact to determine whether the
45 defendant is subject to sentencing for a capital felony as provided in this bill;

46 ▶ provides that the Indigent Capital Defense Trust Fund shall be used to assist
47 participating counties to fulfill legal mandates for the provision of an adequate
48 defense in cases involving aggravated murder or capital second grievous sexual
49 offense against a child;

50 ▶ provides that a jury in a criminal case involving noncapital first degree felony
51 second grievous sexual offense against a child shall consist of eight persons; and

52 ▶ makes technical changes.

53 **Monies Appropriated in this Bill:**

54 None

55 **Other Special Clauses:**

56 None

57 **Utah Code Sections Affected:**

58 AMENDS:

- 59 **76-3-201**, as last amended by Chapter 208, Laws of Utah 2006
- 60 **76-3-203.5**, as last amended by Chapter 59, Laws of Utah 2005
- 61 **76-3-206**, as last amended by Chapter 209, Laws of Utah 2001
- 62 **76-3-207**, as last amended by Chapter 11, Laws of Utah 2003
- 63 **76-3-407**, as last amended by Chapter 208, Laws of Utah 2006
- 64 **76-3-408**, as last amended by Chapter 18, Laws of Utah 1984
- 65 **77-32-601**, as last amended by Chapter 256, Laws of Utah 2002
- 66 **78-46-5**, as last amended by Chapter 209, Laws of Utah 2001

67 ENACTS:

- 68 **76-3-207.1**, Utah Code Annotated 1953
- 69 **76-3-410**, Utah Code Annotated 1953



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

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

73 **76-3-201. Definitions -- Sentences or combination of sentences allowed -- Civil**
74 **penalties -- Hearing.**

75 (1) As used in this section:

76 (a) "Conviction" includes a:

77 (i) judgment of guilt; and

78 (ii) plea of guilty.

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

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

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

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

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

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

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

95 (a) to pay a fine;

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

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

98 (d) to imprisonment;

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

100 (f) to death.

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

102 (i) forfeit property;

103 (ii) dissolve a corporation;

104 (iii) suspend or cancel a license;

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

106 (v) cite for contempt; or

107 (vi) impose any other civil penalty.

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

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

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

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

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

- 119 (ii) charged with a felony or a class A, B, or C misdemeanor; and
- 120 (iii) convicted of a crime.
- 121 (b) The court may not order the defendant to pay restitution of governmental
- 122 transportation expenses if any of the following apply:
- 123 (i) the defendant is charged with an infraction or on a subsequent failure to appear a
- 124 warrant is issued for an infraction; or
- 125 (ii) the defendant was not transported pursuant to a court order.
- 126 (c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i)
- 127 shall be calculated according to the following schedule:
- 128 (A) \$75 for up to 100 miles a defendant is transported;
- 129 (B) \$125 for 100 up to 200 miles a defendant is transported; and
- 130 (C) \$250 for 200 miles or more a defendant is transported.
- 131 (ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant
- 132 transported regardless of the number of defendants actually transported in a single trip.
- 133 (d) If a defendant has been extradited to this state under Title 77, Chapter 30,
- 134 Extradition, to resolve pending criminal charges and is convicted of criminal activity in the
- 135 county to which he has been returned, the court may, in addition to any other sentence it may
- 136 impose, order that the defendant make restitution for costs expended by any governmental
- 137 entity for the extradition.
- 138 (6) (a) In addition to any other sentence the court may impose, the court shall order the
- 139 defendant to pay court-ordered restitution to the county for the cost of incarceration in the
- 140 county correctional facility before and after sentencing if:
- 141 (i) the defendant is convicted of criminal activity that results in incarceration in the
- 142 county correctional facility; and
- 143 (ii) (A) the defendant is not a state prisoner housed in a county correctional facility
- 144 through a contract with the Department of Corrections; or
- 145 (B) the reimbursement does not duplicate the reimbursement provided under Section
- 146 64-13c-301 if the defendant is a state prisoner housed in a county correctional facility as a
- 147 condition of probation under Subsection 77-18-1(8).
- 148 (b) (i) The costs of incarceration under Subsection (6)(a) are:
- 149 (A) the daily core inmate incarceration costs and medical and transportation costs

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

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

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

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

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

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

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

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

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

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

181 regarding aggravating and mitigating circumstances promulgated by the Sentencing
182 Commission.

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

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

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

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

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

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

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

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

194 (B) Section 76-5-402.1, rape of a child, unless:

195 (I) the defendant is being sentenced for any of the offenses described in Subsections
196 (8)(a)(i)(B) through (D); and

197 (II) the defendant was 18 years old or older at the time of the offense for which the
198 defendant is being sentenced;

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

200 (D) Section 76-5-402.3, object rape of a child, unless:

201 (I) the defendant is being sentenced for any of the offenses described in Subsections
202 (8)(a)(i)(B) through (D); and

203 (II) the defendant was 18 years old or older at the time of the offense for which the
204 defendant is being sentenced;

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

206 (F) Section 76-5-403.1, sodomy on a child, unless:

207 (I) the defendant is being sentenced for any of the offenses described in Subsections
208 (8)(a)(i)(B) through (D); and

209 (II) the defendant was 18 years old or older at the time of the offense for which the
210 defendant is being sentenced;

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

212 (H) ~~(I)~~ [Section] Subsection 76-5-404.1(2), sexual abuse of a child ~~[and]~~; or
213 (II) Subsection 76-5-404.1(4), aggravated sexual abuse of a child, unless:
214 (aa) the defendant is being sentenced for any of the offenses described in Subsections
215 (8)(a)(i)(B) through (D); and
216 (bb) the defendant was 18 years old or older at the time of the offense for which the
217 defendant is being sentenced;
218 (I) Section 76-5-405, aggravated sexual assault;
219 (J) any offense in any other state or federal jurisdiction which constitutes or would
220 constitute a crime in Subsections (8)(a)(ii)(A) through (I); or
221 (K) the attempt to commit any of the offenses in Subsections (8)(a)(ii)(A) through (J).
222 (b) This Subsection (8) takes precedence over any conflicting provision of law, except
223 Section 76-3-410.

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

225 **76-3-203.5. Habitual violent offender -- Definition -- Procedure -- Penalty.**

226 (1) As used in this section:

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

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

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

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

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

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

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

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

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

- 243 (G) stalking, Subsection 76-5-106.5(6);
- 244 (H) terroristic threat, Section 76-5-107;
- 245 (I) child abuse, Subsections 76-5-109(2)(a) and (b);
- 246 (J) commission of domestic violence in the presence of a child, Section 76-5-109.1;
- 247 (K) abuse or neglect of disabled child, Section 76-5-110;
- 248 (L) abuse, neglect, or exploitation of a vulnerable adult, Section 76-5-111;
- 249 (M) endangerment of child or elder adult, Section 76-5-112.5;
- 250 (N) criminal homicide offenses under Title 76, Chapter 5, Part 2, Criminal Homicide;
- 251 (O) kidnapping, child kidnapping, and aggravated kidnapping under Title 76, Chapter
- 252 5, Part 3, Kidnapping;
- 253 (P) rape, Section 76-5-402;
- 254 (Q) rape of a child, Section 76-5-402.1;
- 255 (R) object rape, Section 76-5-402.2;
- 256 (S) object rape of a child, Section 76-5-402.3;
- 257 (T) forcible sodomy, Section 76-5-403;
- 258 (U) sodomy on a child, Section 76-5-403.1;
- 259 (V) forcible sexual abuse, Section 76-5-404;
- 260 (W) aggravated sexual abuse of a child and sexual abuse of a child, Section
- 261 76-5-404.1;
- 262 (X) aggravated sexual assault, Section 76-5-405;
- 263 (Y) sexual exploitation of a minor, Section 76-5a-3;
- 264 (Z) aggravated burglary and burglary of a dwelling under Title 76, Chapter 6, Part 2,
- 265 Burglary and Criminal Trespass;
- 266 (AA) aggravated robbery and robbery under Title 76, Chapter 6, Part 3, Robbery;
- 267 (BB) theft by extortion under Subsection 76-6-406(2)(a) or (b);
- 268 (CC) tampering with a witness under Subsection 76-8-508(1);
- 269 (DD) retaliation against a witness, victim, or informant under Section 76-8-508.3;
- 270 (EE) tampering with a juror under Subsection 76-8-508.5(2)(c);
- 271 (FF) extortion to dismiss a criminal proceeding under Section 76-8-509 if by any threat
- 272 or by use of force theft by extortion has been committed pursuant to Subsections
- 273 76-6-406(2)(a), (b), and (i);

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

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

278 (II) unlawful delivery of explosive, chemical, or incendiary devices under Section
279 76-10-307;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

347 Section 3. Section **76-3-206** is amended to read:

348 **76-3-206. Capital felony -- Penalties.**

349 (1) (a) A person who has pled guilty to or been convicted of a capital felony shall be
350 sentenced in accordance with Section 76-3-207. [~~That sentence~~]

351 (b) The sentence for a criminal homicide capital felony shall be death, an indeterminate
352 prison term of not less than 20 years and which may be for life, or, on or after April 27, 1992,
353 life in prison without parole.

354 (c) The sentence for a capital second grievous sexual offense against a child shall be
355 death or life in prison without parole.

356 (2) (a) The judgment of conviction and sentence of death is subject to automatic review
357 by the Utah State Supreme Court within 60 days after certification by the sentencing court of
358 the entire record unless time is extended an additional period not to exceed 30 days by the Utah
359 State Supreme Court for good cause shown.

360 (b) The review by the Utah State Supreme Court has priority over all other cases and
361 shall be heard in accordance with rules promulgated by the Utah State Supreme Court.

362 Section 4. Section **76-3-207** is amended to read:

363 **76-3-207. Capital felony -- Sentencing proceeding.**

364 (1) (a) When a defendant has pled guilty to or been found guilty of a capital felony,
365 there shall be further proceedings before the court or jury on the issue of sentence.

366 (b) In the case of a plea of guilty to a capital felony, the sentencing proceedings shall

367 be conducted before a jury or, upon request of the defendant and with the approval of the court
368 and the consent of the prosecution, by the court which accepted the plea.

369 (c) (i) When a defendant has been found guilty of a capital felony, the proceedings
370 shall be conducted before the court or jury which found the defendant guilty, provided the
371 defendant may waive hearing before the jury with the approval of the court and the consent of
372 the prosecution, in which event the hearing shall be before the court.

373 (ii) If circumstances make it impossible or impractical to reconvene the same jury for
374 the sentencing proceedings, the court may dismiss that jury and convene a new jury for the
375 proceedings.

376 (d) If a retrial of the sentencing proceedings is necessary as a consequence of a remand
377 from an appellate court, the sentencing authority shall be determined as provided in Subsection
378 (6).

379 (2) (a) In capital sentencing proceedings, evidence may be presented on:

380 (i) the nature and circumstances of the crime;

381 (ii) the defendant's character, background, history, and mental and physical condition;

382 (iii) the victim and the impact of the crime on the victim's family and community

383 without comparison to other persons or victims; and

384 (iv) any other facts in aggravation or mitigation of the penalty that the court considers
385 relevant to the sentence.

386 (b) Any evidence the court considers to have probative force may be received
387 regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and
388 the defendant shall be permitted to present argument for or against the sentence of death.

389 (3) ~~[Aggravating]~~ (a) For criminal homicide, aggravating circumstances include those
390 outlined in Section 76-5-202.

391 (b) For capital second grievous sexual offense against a child, under Section 76-3-410,
392 aggravating circumstances include those outlined in Subsection 76-3-207.1(1).

393 (4) ~~[Mitigating]~~ (a) For criminal homicide, mitigating circumstances include:

394 ~~[(a)]~~ (i) the defendant has no significant history of prior criminal activity;

395 ~~[(b)]~~ (ii) the homicide was committed while the defendant was under the influence of
396 mental or emotional disturbance;

397 ~~[(c)]~~ (iii) the defendant acted under duress or under the domination of another person;

398 ~~[(d)]~~ (iv) at the time of the homicide, the capacity of the defendant to appreciate the
399 wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired
400 as a result of a mental condition, intoxication, or influence of drugs, except that "mental
401 condition" under this Subsection (4)~~[(d)]~~(a)(iv) does not mean an abnormality manifested
402 primarily by repeated criminal conduct;

403 ~~[(e)]~~ (v) the youth of the defendant at the time of the crime;

404 ~~[(f)]~~ (vi) the defendant was an accomplice in the homicide committed by another
405 person and the defendant's participation was relatively minor; and

406 ~~[(g)]~~ (vii) any other fact in mitigation of the penalty.

407 (b) For capital second grievous sexual offense against a child, under Section 76-3-410,
408 mitigating circumstances include those outlined in Subsection 76-3-207.1(2).

409 (5) (a) The court or jury, as the case may be, shall retire to consider the penalty. Except
410 as provided in Subsection 76-3-207.5(2), in all proceedings before a jury, under this section[
411 it]:

412 (i) in a criminal homicide case, the jury shall be instructed as to the punishment to be
413 imposed upon a unanimous decision for death and that the penalty of either an indeterminate
414 prison term of not less than 20 years and which may be for life or life in prison without parole,
415 shall be imposed if a unanimous decision for death is not found[-]; or

416 (ii) in a capital second grievous sexual offense against a child case, the jury shall be
417 instructed as to the punishment to be imposed upon a unanimous decision for death and that the
418 penalty of life in prison without parole shall be imposed if a unanimous decision for death is
419 not found.

420 (b) The death penalty shall only be imposed if, after considering the totality of the
421 aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that
422 total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable
423 doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.
424 If the jury reports unanimous agreement to impose the sentence of death, the court shall
425 discharge the jury and shall impose the sentence of death.

426 (c) (i) [Hf] In a criminal homicide case, if the jury is unable to reach a unanimous
427 decision imposing the sentence of death [or the state is not seeking the death penalty], the jury
428 shall then determine whether the penalty of life in prison without parole shall be imposed,

429 except as provided in Subsection 76-3-207.5(2). The penalty of life in prison without parole
430 shall only be imposed if the jury determines that the sentence of life in prison without parole is
431 appropriate. If the jury reports agreement by ten jurors or more to impose the sentence of life
432 in prison without parole, the court shall discharge the jury and shall impose the sentence of life
433 in prison without parole. If ten jurors or more do not agree upon a sentence of life in prison
434 without parole, the court shall discharge the jury and impose an indeterminate prison term of
435 not less than 20 years and which may be for life.

436 (ii) In a capital second grievous sexual offense against a child case, if the jury is unable
437 to reach a unanimous decision imposing the sentence of death, the defendant shall be sentenced
438 to a term of imprisonment for life without the possibility of parole.

439 (d) If the defendant waives hearing before the jury as to sentencing, with the approval
440 of the court and the consent of the prosecution, the court shall determine the appropriate
441 penalty according to the standards of Subsections (5)(b) and (c).

442 (e) If the defendant is sentenced to more than one term of life in prison with or without
443 the possibility of parole, or in addition to a sentence of life in prison with or without the
444 possibility of parole the defendant is sentenced for other offenses which result in terms of
445 imprisonment, the judge shall determine whether the terms of imprisonment shall be imposed
446 as concurrent or consecutive sentences in accordance with Section 76-3-401.

447 (6) Upon any appeal by the defendant where the sentence is of death, the appellate
448 court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence
449 of death and remand the case to the trial court for new sentencing proceedings to the extent
450 necessary to correct the error or errors. An error in the sentencing proceedings may not result
451 in the reversal of the conviction of a capital felony. In cases of remand for new sentencing
452 proceedings, all exhibits and a transcript of all testimony and other evidence properly admitted
453 in the prior trial and sentencing proceedings are admissible in the new sentencing proceedings,
454 and if the sentencing proceeding was before a:

455 (a) jury, a new jury shall be impaneled for the new sentencing proceeding unless the
456 defendant waives the hearing before the jury with the approval of the court and the consent of
457 the prosecution, in which case the proceeding shall be held according to Subsection (6)(b) or
458 (c), as applicable;

459 (b) judge, the original trial judge shall conduct the new sentencing proceeding; or

460 (c) judge, and the original trial judge is unable or unavailable to conduct a new
461 sentencing proceeding, then another judge shall be designated to conduct the new sentencing
462 proceeding, and the new proceeding will be before a jury unless the defendant waives the
463 hearing before the jury with the approval of the court and the consent of the prosecution.

464 (7) ~~[In the event the death]~~ If the penalty of death is held to be unconstitutional, for a
465 particular offense, by the Utah Supreme Court or the United States Supreme Court, the court
466 having jurisdiction over a person previously sentenced to death for ~~[a capital felony]~~ that
467 offense shall cause the person to be brought before the court, and the court shall sentence the
468 person to~~[:]~~ life in prison without parole.

469 ~~[(a) an indeterminate prison term of not less than 20 years and which may be for life, if~~
470 ~~the death penalty is held unconstitutional prior to April 27, 1992; or]~~

471 ~~[(b) life in prison without parole if the death penalty is held unconstitutional on or after~~
472 ~~April 27, 1992, and any person who is thereafter convicted of a capital felony shall be~~
473 ~~sentenced to an indeterminate prison term of not less than 20 years and which may be for life or~~
474 ~~life in prison without parole.]~~

475 (8) (a) If the appellate court's final decision regarding any appeal of a sentence of death
476 precludes the imposition of the death penalty due to mental retardation or subaverage general
477 intellectual functioning under Section 77-15a-101, the court having jurisdiction over a
478 defendant previously sentenced to death for a capital felony shall cause the defendant to be
479 brought before the sentencing court, and the court shall sentence the defendant to life in prison
480 without parole.

481 (b) If the appellate court precludes the imposition of the death penalty under
482 Subsection (8)(a), but the appellate court finds that sentencing the defendant to life in prison
483 without parole is likely to result in a manifest injustice, it may remand the case to the
484 sentencing court for further sentencing proceedings to determine if the defendant should serve
485 a sentence of life in prison without parole or an indeterminate prison term of not less than 20
486 years and which may be for life.

487 Section 5. Section **76-3-207.1** is enacted to read:

488 **76-3-207.1. Aggravating and mitigating circumstances for capital second grievous**
489 **sexual offense against a child.**

490 (1) In determining, under Section 76-3-207, whether a defendant should receive a

491 sentence of death for capital second grievous sexual offense against a child, as described in
492 Subsection 76-3-410(2), the aggravating circumstances that the jury, or the court if the
493 defendant waives sentencing by the jury under Subsection 76-3-207(1)(c)(i), may consider
494 include:

495 (a) the defendant used a weapon, force, violence, substantial duress or menace, or
496 threat of harm, in committing the offense or before or after committing the offense, in an
497 attempt to frighten the child victim or keep the child victim from reporting the offense;

498 (b) the defendant caused bodily injury to the child victim during or as a result of the
499 offense;

500 (c) the defendant caused the child victim severe psychological harm;

501 (d) the defendant committed an offense described in Title 76, Chapter 5, Part 4, Sexual
502 Offenses, against more than one child victim or victim, at the same time, or during the same
503 course of conduct, or previous to or subsequent to the instant offense;

504 (e) the defendant acted in concert with another offender during the offense or
505 knowingly committed the offense in the presence of a person other than the victim or with lewd
506 intent to reveal the offense to another;

507 (f) the defendant encouraged, aided, allowed, or benefited from any act of prostitution
508 or sexual act by the child victim with any other person or sexual performance by the child
509 victim before any other person;

510 (g) the defendant is a parent, stepparent, adoptive parent, or legal guardian of the child
511 victim, or was otherwise in a position of trust with the child victim;

512 (h) the defendant knowingly created a great risk of death or great bodily harm to the
513 victim;

514 (i) the defendant committed the offense incident to an act, scheme, course of conduct,
515 or criminal episode during which the defendant committed or attempted to commit murder,
516 aggravated murder, child kidnapping, kidnapping, aggravated kidnapping, or aggravated
517 assault;

518 (j) the defendant committed the offense for pecuniary or other personal gain;

519 (k) the defendant previously committed or was convicted of:

520 (i) aggravated murder, Section 76-5-202;

521 (ii) attempted aggravated murder, Section 76-5-202;

- 522 (iii) murder, Section 76-5-203;
523 (iv) attempted murder, Section 76-5-203; or
524 (v) an offense committed in another jurisdiction which if committed in this state would
525 be a violation of a crime listed in this Subsection (1)(k):
526 (l) the defendant was previously convicted of:
527 (i) aggravated assault, Subsection 76-5-103(2);
528 (ii) mayhem, Section 76-5-105;
529 (iii) kidnapping, Section 76-5-301;
530 (iv) child kidnapping, Section 76-5-301.1; or
531 (v) aggravated kidnapping, Section 76-5-302;
532 (m) the defendant administered, or caused to be administered, alcohol or a controlled
533 substance to the child victim; or
534 (n) the defendant committed the offense in an especially heinous, atrocious, cruel, or
535 exceptionally depraved manner, any of which must be demonstrated by physical torture, serious
536 physical abuse, or serious bodily injury of the victim.
537 (2) In determining, under Section 76-3-207, whether a defendant should receive a
538 sentence of death for capital second grievous sexual offense against a child, as described in
539 Subsection 76-3-410(2), the mitigating circumstances that the jury, or the court if the defendant
540 waives sentencing by the jury under Subsection 76-3-207(1)(c)(i), may consider include:
541 (a) the defendant has no significant history of prior criminal activity other than the
542 prior conviction for a grievous sexual offense against a child;
543 (b) the defendant committed the offense while the defendant was under the influence of
544 mental or emotional disturbance;
545 (c) the defendant acted under duress or under the domination of another person;
546 (d) the capacity of the defendant to appreciate the wrongfulness of the defendant's
547 conduct or to conform the defendant's conduct to the requirement of law was impaired as a
548 result of a mental condition, intoxication, or influence of drugs, except that "mental condition"
549 under this Subsection (3)(d) does not mean an abnormality manifested primarily by repeated
550 criminal conduct or by a sexual attraction to children;
551 (e) the youth of the defendant at the time of the crime;
552 (f) the defendant admits committing the offense against the victim, accepts

553 responsibility for the defendant's conduct, and exhibits remorse for the offense; and

554 (g) any other fact in mitigation of the penalty.

555 Section 6. Section **76-3-407** is amended to read:

556 **76-3-407. Repeat and habitual sex offenders -- Additional prison term for prior**
557 **felony convictions.**

558 (1) If the new offense is the commission of or the attempt to commit a first or second
559 degree felony under Title 76, Chapter 5, Part 4, Sexual Offenses, the court shall impose, in
560 addition to and consecutive to any other prison term, an additional five-year term for each prior
561 conviction for a felony sexual offense in Utah or an offense in any other state or federal
562 jurisdiction which constitutes or would constitute a crime or an attempted crime which, if
563 committed in Utah, would be punishable under Title 76, Chapter 5, Part 4, Sexual Offenses, if
564 the trier of fact finds the prior felony conviction was entered before the commission of the new
565 offense.

566 (2) This section supercedes any other provision of law except [~~Section~~] Sections
567 76-3-408 and 76-3-410.

568 Section 7. Section **76-3-408** is amended to read:

569 **76-3-408. Repeat and habitual sex offenders -- Life imprisonment without parole**
570 **on second conviction.**

571 (1) Notwithstanding any other provision of law, except as provided in Subsection (3)
572 or Section 76-3-410, a person who has been convicted in [~~two~~] one or more separate
573 prosecutions of any sexual offense which, if committed in Utah or any other state or federal
574 jurisdiction, would contain elements sufficient to constitute any of the offenses described in
575 Sections 76-5-402, 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403, 76-5-403.1, 76-5-404,
576 76-5-404.1, and 76-5-405, shall, upon a subsequent conviction of any offense set forth in this
577 section, be sentenced to a term of imprisonment for life without the possibility of parole if the
578 existence of the prior felony conviction or convictions has been charged and admitted or found
579 true in the action for the new offense and if the prior felony conviction or convictions were
580 entered before the commission of the new offense.

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

584 section.

585 (3) If the conviction for which a defendant will receive the sentencing enhancement
586 described in this section is for conduct that occurred before April 30, 2007, the sentencing
587 enhancement in this section does not apply, unless the conviction is for at least a third sexual
588 offense described in this section.

589 Section 8. Section **76-3-410** is enacted to read:

590 **76-3-410. Capital second grievous sexual offense against a child -- Noncapital first**
591 **degree felony second grievous sexual offense against a child -- Notice of intent to seek the**
592 **death penalty.**

593 (1) For purposes of this section:

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

596 (i) a prison in Utah; or

597 (ii) an equivalent correctional institution of another state or the United States.

598 (b) "Grievous sexual offense against a child" means:

599 (i) rape of a child, as described in Section 76-5-402.1;

600 (ii) object rape of a child, as described in Section 76-5-402.3;

601 (iii) sodomy on a child, as described in Section 76-5-403.1; or

602 (iv) aggravated sexual abuse of a child, as described in Section 76-5-404.1.

603 (2) Notwithstanding any other provision of law, a person convicted of a grievous
604 sexual offense against a child is guilty of a capital second grievous sexual offense against a
605 child and shall be sentenced for a capital felony, pursuant to the provisions of Section 76-3-206
606 and Section 76-3-207, if:

607 (a) the person was at least 18 years of age on the day that the person committed the
608 grievous sexual offense against a child;

609 (b) the prosecutor files a notice of intent to seek the death penalty, pursuant to
610 Subsection (5); and

611 (c) the trier of fact finds beyond a reasonable doubt that:

612 (i) the conviction is for conduct committed on or after April 30, 2007; and

613 (ii) prior to the conduct described in Subsection (2)(c)(i), the person was convicted of,
614 and committed to prison for:

- 615 (A) a grievous sexual offense against a child; or
616 (B) an offense in any state, district, territory, or possession of the United States that, if
617 committed in this state, would constitute a grievous sexual offense against a child.
- 618 (3) Notwithstanding any other provision of law, a person convicted of a grievous
619 sexual offense against a child is guilty of a noncapital first degree felony grievous sexual
620 offense against a child and shall be sentenced by the court for life in prison without parole, if:
- 621 (a) the person was at least 18 years of age on the day that the person committed the
622 grievous sexual offense against a child;
- 623 (b) the prosecutor has not filed a notice of intent to seek the death penalty, pursuant to
624 Subsection (5); and
- 625 (c) the trier of fact finds beyond a reasonable doubt that:
- 626 (i) the conviction is for conduct committed on or after April 30, 2007; and
627 (ii) prior to the conduct described in Subsection (3)(c)(i), the person was convicted of,
628 and committed to prison for:
- 629 (A) a grievous sexual offense against a child; or
630 (B) an offense in any state, district, territory, or possession of the United States that, if
631 committed in this state, would constitute a grievous sexual offense against a child.
- 632 (4) (a) If a person is charged with an offense described in Subsection (2) or (3), the
633 prosecuting attorney, or grand jury if an indictment is returned, shall provide notice in the
634 information or indictment that:
- 635 (i) the defendant is charged with a second grievous sexual offense against a child; and
636 (ii) that the offense is a first degree felony, noncapital offense, unless the prosecutor
637 files a notice of intent to seek the death penalty, whereupon the offense is a capital felony.
- 638 (b) The notice described in Subsection (4)(a) shall include the case number, court, and
639 date of conviction or commitment to prison of any case relied upon by the prosecution as a
640 prior conviction of the defendant for a grievous sexual offense against a child.
- 641 (5) (a) Except as provided in Subsection (5)(b)(ii), within 60 days after the day on
642 which the defendant's arraignment is held for an offense described in Subsection (2) or (3), the
643 prosecutor may file notice of intent to seek the death penalty.
- 644 (b) The notice described in Subsection (5)(a):
- 645 (i) shall be served on the defendant or defense counsel and filed with the court; and

646 (ii) may be filed more than 60 days after the arraignment described in Subsection (5)(a)
647 upon written stipulation of the parties, or upon a finding of good cause by the court.

648 (6) Without the consent of the prosecutor, the court may not accept a plea of guilty to a
649 noncapital first degree felony second grievous sexual offense against a child during the period
650 during which the prosecutor may file a notice to seek the death penalty under Subsection (5).

651 (7) (a) The defendant shall serve notice in writing upon the prosecutor if the defendant
652 intends to deny that:

653 (i) the defendant is the person who was convicted of, or committed to prison for, the
654 offense described in Subsection (2)(c)(ii) or (3)(c)(ii);

655 (ii) the defendant was represented by counsel or had waived counsel; or

656 (iii) the defendant's plea was understandingly or voluntarily entered.

657 (b) The notice of denial described in Subsection (7)(a) shall:

658 (i) be served not later than five days prior to trial; and

659 (ii) state in detail the defendant's contention regarding the previous conviction and
660 commitment to prison.

661 (8) (a) If the defendant enters a denial under Subsection (7) and if the case is tried to a
662 jury, the jury may not be told until after it returns its verdict on the underlying charge, of the:

663 (i) defendant's previous convictions described in Subsection (2)(c)(ii) or (3)(c)(ii),
664 except as otherwise provided in the Utah Rules of Evidence; or

665 (ii) allegation against the defendant that the defendant was previously convicted of an
666 offense described in Subsection (2)(c)(ii) or (3)(c)(ii).

667 (b) If the jury's verdict is guilty, the defendant shall be tried regarding the allegation
668 that the defendant was convicted of, and committed to prison for, an offense described in
669 Subsection (2)(c)(ii) or (3)(c)(ii) by the same jury, if practicable, unless the defendant waives
670 the jury, in which case the allegation shall be tried immediately to the court.

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

674 (ii) Prior to sentencing, the trier of fact shall determine whether to make the finding
675 described in Subsection (2)(c) or (3)(c).

676 (d) (i) If a conviction and commitment to prison described in Subsection (2)(c)(ii) or

677 (3)(c)(ii) is based upon a plea of guilty or no contest, there is a rebuttable presumption that the
678 conviction and commitment to prison were regular and lawful in all respects if the conviction
679 and commitment to prison occurred after January 1, 1970.

680 (ii) If the conviction and commitment to prison described in Subsection (2)(c)(ii) or
681 (3)(c)(ii) occurred prior to January 1, 1970, the burden is on the prosecution to establish by a
682 preponderance of the evidence that the defendant was then represented by counsel or had
683 lawfully waived the right to have counsel present, and that the defendant's plea was
684 understandingly and voluntarily entered.

685 (e) If the trier of fact makes the finding described in Subsection (2)(c) or (3)(c), the
686 court shall enter that specific finding on the record and shall indicate in the order of judgment
687 and commitment that the defendant has been found by the trier of fact to be subject to the
688 sentencing provisions of this section.

689 Section 9. Section **77-32-601** is amended to read:

690 **77-32-601. Establishment of Indigent Capital Defense Trust Fund -- Use of fund**
691 **-- Compensation for indigent legal defense from fund.**

692 (1) For purposes of this part, "fund" means the Indigent Capital Defense Trust Fund.

693 (2) There is established a private-purpose trust fund known as the "Indigent Capital
694 Defense Trust Fund" which shall be nonlapsing and shall be disbursed by the Division of
695 Finance at the direction of the board and subject to ~~[the provisions of]~~ this chapter.

696 (3) The fund consists of:

697 (a) monies received from participating counties as provided in Sections 77-32-602 and
698 77-32-603;

699 (b) appropriations made to the fund by the Legislature as provided in Section
700 77-32-603; and

701 (c) interest and earnings from the investment of fund monies.

702 (4) Fund monies shall be invested by the state treasurer with the earnings and interest
703 accruing to the fund.

704 (5) The fund shall be used to assist participating counties with financial resources, as
705 provided in Subsection (6), to fulfill their constitutional and statutory mandates for the
706 provision of an adequate defense for indigents prosecuted for the violation of state laws in
707 cases involving ~~[capital felonies:]~~:

708 (a) aggravated murder; or
709 (b) capital second grievous sexual offense against a child.
710 (6) Monies allocated to or deposited in this fund shall be used only:
711 (a) to reimburse participating counties for expenditures made for an attorney appointed
712 to represent an indigent, other than a state inmate in a state prison, prosecuted for a capital
713 felony in a participating county; and
714 (b) for administrative costs pursuant to Section 77-32-401.
715 Section 10. Section **78-46-5** is amended to read:
716 **78-46-5. Trial by jury.**
717 (1) A trial jury consists of:
718 (a) twelve persons in a capital case;
719 (b) eight persons in a criminal case [~~which~~]:
720 (i) for a noncapital first degree felony second grievous sexual offense against a child;
721 or
722 (ii) that carries a term of incarceration of more than one year as a possible sentence for
723 the most serious offense charged;
724 (c) six persons in a criminal case which carries a term of incarceration of more than six
725 months but not more than one year as a possible sentence for the most serious offense charged;
726 (d) four persons in a criminal case which carries a term of incarceration of six months
727 or less as a possible sentence for the most serious offense charged; and
728 (e) eight persons in a civil case at law except that the jury shall be four persons in a
729 civil case for damages of less than \$20,000, exclusive of costs, interest, and attorney fees.
730 (2) Except in the trial of a capital felony, the parties may stipulate upon the record to a
731 jury of a lesser number than established by this section.
732 (3) (a) The verdict in a criminal case shall be unanimous.
733 (b) The verdict in a civil case shall be by not less than three-fourths of the jurors.
734 (4) There is no jury in the trial of small claims cases.
735 (5) There is no jury in the adjudication of a minor charged with what would constitute
736 a crime if committed by an adult.