

**VIOLENT OFFENSES AMENDMENTS**

2009 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Jennifer M. Seelig**

Senate Sponsor: Jon J. Greiner

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**LONG TITLE**

**General Description:**

This bill modifies provisions of the Criminal Code, including a felony committed with other persons, aggravated murder, predicate criminal gang offenses, and the offense of felony discharge of a firearm.

**Highlighted Provisions:**

This bill:

- ▶ amends the enhanced penalty for committing a first degree felony with other persons by imposing five more years imprisonment in addition to the statutory minimum term of imprisonment for the felony;
- ▶ amends the elements of aggravated murder to include felony discharge of a firearm;
- ▶ amends the definition of predicate gang offenses that constitute criminal gang activity in defined circumstances to include retail theft;
- ▶ adds the offense of retail theft to the offenses subject to an enhanced penalty if committed with two or more persons; and
- ▶ amends the offense of felony discharge of a firearm to include situations that constitute criminal homicide or attempted criminal homicide.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

30 76-3-203.1, as last amended by Laws of Utah 2005, Chapter 93

31 76-5-202, as last amended by Laws of Utah 2008, Chapter 12

32 76-9-802, as enacted by Laws of Utah 2008, Chapter 15

33 76-10-508.1, as enacted by Laws of Utah 2008, Chapter 296



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

36 Section 1. Section 76-3-203.1 is amended to read:

37 **76-3-203.1. Offenses committed in concert with two or more persons -- Notice --**  
38 **Enhanced penalties.**

39 (1) (a) A person who commits any offense listed in Subsection (4) is subject to an  
40 enhanced penalty for the offense as provided in Subsection (3) if the trier of fact finds beyond  
41 a reasonable doubt that the person acted in concert with two or more persons.

42 (b) "In concert with two or more persons" as used in this section means the defendant  
43 was aided or encouraged by at least two other persons in committing the offense and was  
44 aware that he was so aided or encouraged, and each of the other persons:

45 (i) was physically present; or

46 (ii) participated as a party to any offense listed in Subsection (4).

47 (c) For purposes of Subsection (1)(b)(ii):

48 (i) other persons participating as parties need not have the intent to engage in the same  
49 offense or degree of offense as the defendant; and

50 (ii) a minor is a party if the minor's actions would cause him to be a party if he were  
51 an adult.

52 (2) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to  
53 be subscribed upon the information or indictment notice that the defendant is subject to the  
54 enhanced penalties provided under this section.

55 (3) The enhanced penalty for a:

56 (a) class B misdemeanor is a class A misdemeanor;

57 (b) class A misdemeanor is a third degree felony;

- 58 (c) third degree felony is a second degree felony;
- 59 (d) second degree felony is a first degree felony; and
- 60 (e) first degree felony is an indeterminate prison term of not less than [~~nine years~~] five
- 61 years in addition to the statutory minimum prison term for the offense, and which may be for
- 62 life.
- 63 (4) Offenses referred to in Subsection (1) are:
- 64 (a) any criminal violation of Title 58, Chapter 37, 37a, 37b, or 37c, regarding
- 65 drug-related offenses;
- 66 (b) assault and related offenses under Title 76, Chapter 5, Part 1, Assault and Related
- 67 Offenses;
- 68 (c) any criminal homicide offense under Title 76, Chapter 5, Part 2, Criminal
- 69 Homicide;
- 70 (d) kidnapping and related offenses under Title 76, Chapter 5, Part 3, Kidnapping,
- 71 Trafficking, and Smuggling;
- 72 (e) any felony sexual offense under Title 76, Chapter 5, Part 4, Sexual Offenses;
- 73 (f) sexual exploitation of a minor as defined in Section 76-5a-3;
- 74 (g) any property destruction offense under Title 76, Chapter 6, Part 1, Property
- 75 Destruction;
- 76 (h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2,
- 77 Burglary and Criminal Trespass;
- 78 (i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3, Robbery;
- 79 (j) theft and related offenses under Title 76, Chapter 6, Part 4, Theft, or Part 6, Retail
- 80 Theft;
- 81 (k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-504,
- 82 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514,
- 83 76-6-516, 76-6-517, 76-6-518, and 76-6-520;
- 84 (l) any offense of obstructing government operations under Title 76, Chapter 8, Part 3,
- 85 except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

- 86 (m) tampering with a witness or other violation of Section 76-8-508;
- 87 (n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;
- 88 (o) any explosives offense under Title 76, Chapter 10, Part 3, Explosives;
- 89 (p) any weapons offense under Title 76, Chapter 10, Part 5, Weapons;
- 90 (q) pornographic and harmful materials and performances offenses under Title 76,
- 91 Chapter 10, Part 12, Pornographic and Harmful Materials and Performances;
- 92 (r) prostitution and related offenses under Title 76, Chapter 10, Part 13, Prostitution;
- 93 (s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;
- 94 (t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;
- 95 (u) communications fraud as defined in Section 76-10-1801;
- 96 (v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency
- 97 Transaction Reporting Act; and
- 98 (w) burglary of a research facility as defined in Section 76-10-2002.

99 (5) It is not a bar to imposing the enhanced penalties under this section that the  
100 persons with whom the actor is alleged to have acted in concert are not identified,  
101 apprehended, charged, or convicted, or that any of those persons are charged with or convicted  
102 of a different or lesser offense.

103 Section 2. Section **76-5-202** is amended to read:

104 **76-5-202. Aggravated murder.**

105 (1) Criminal homicide constitutes aggravated murder if the actor intentionally or  
106 knowingly causes the death of another under any of the following circumstances:

- 107 (a) the homicide was committed by a person who is confined in a jail or other  
108 correctional institution;
- 109 (b) the homicide was committed incident to one act, scheme, course of conduct, or  
110 criminal episode during which two or more persons were killed, or during which the actor  
111 attempted to kill one or more persons in addition to the victim who was killed;
- 112 (c) the actor knowingly created a great risk of death to a person other than the victim  
113 and the actor;

114 (d) the homicide was committed incident to an act, scheme, course of conduct, or  
115 criminal episode during which the actor committed or attempted to commit aggravated  
116 robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy,  
117 sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse  
118 of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault,  
119 aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping,  
120 or child kidnapping;

121 (e) the homicide was committed incident to one act, scheme, course of conduct, or  
122 criminal episode during which the actor committed the crime of abuse or desecration of a dead  
123 human body as defined in Subsection 76-9-704(2)(e);

124 (f) the homicide was committed for the purpose of avoiding or preventing an arrest of  
125 the defendant or another by a peace officer acting under color of legal authority or for the  
126 purpose of effecting the defendant's or another's escape from lawful custody;

127 (g) the homicide was committed for pecuniary gain;

128 (h) the defendant committed, or engaged or employed another person to commit the  
129 homicide pursuant to an agreement or contract for remuneration or the promise of  
130 remuneration for commission of the homicide;

131 (i) the actor previously committed or was convicted of:

132 (i) aggravated murder[, ~~Section 76-5-202~~] under this section;

133 (ii) attempted aggravated murder[, ~~Section 76-5-202~~] under this section;

134 (iii) murder, Section 76-5-203;

135 (iv) attempted murder, Section 76-5-203; or

136 (v) an offense committed in another jurisdiction which if committed in this state  
137 would be a violation of a crime listed in this Subsection (1)(i);

138 (j) the actor was previously convicted of:

139 (i) aggravated assault, Subsection 76-5-103(2);

140 (ii) mayhem, Section 76-5-105;

141 (iii) kidnapping, Section 76-5-301;

- 142 (iv) child kidnapping, Section 76-5-301.1;
- 143 (v) aggravated kidnapping, Section 76-5-302;
- 144 (vi) rape, Section 76-5-402;
- 145 (vii) rape of a child, Section 76-5-402.1;
- 146 (viii) object rape, Section 76-5-402.2;
- 147 (ix) object rape of a child, Section 76-5-402.3;
- 148 (x) forcible sodomy, Section 76-5-403;
- 149 (xi) sodomy on a child, Section 76-5-403.1;
- 150 (xii) aggravated sexual abuse of a child, Section 76-5-404.1;
- 151 (xiii) aggravated sexual assault, Section 76-5-405;
- 152 (xiv) aggravated arson, Section 76-6-103;
- 153 (xv) aggravated burglary, Section 76-6-203;
- 154 (xvi) aggravated robbery, Section 76-6-302; [~~or~~]
- 155 (xvii) felony discharge of a firearm, Section 76-10-508.1; or
- 156 [~~(xvii)~~] (xviii) an offense committed in another jurisdiction which if committed in this
- 157 state would be a violation of a crime listed in this Subsection (1)(j);
- 158 (k) the homicide was committed for the purpose of:
- 159 (i) preventing a witness from testifying;
- 160 (ii) preventing a person from providing evidence or participating in any legal
- 161 proceedings or official investigation;
- 162 (iii) retaliating against a person for testifying, providing evidence, or participating in
- 163 any legal proceedings or official investigation; or
- 164 (iv) disrupting or hindering any lawful governmental function or enforcement of laws;
- 165 (l) the victim is or has been a local, state, or federal public official, or a candidate for
- 166 public office, and the homicide is based on, is caused by, or is related to that official position,
- 167 act, capacity, or candidacy;
- 168 (m) the victim is or has been a peace officer, law enforcement officer, executive
- 169 officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official,

170 juror, probation officer, or parole officer, and the victim is either on duty or the homicide is  
171 based on, is caused by, or is related to that official position, and the actor knew, or reasonably  
172 should have known, that the victim holds or has held that official position;

173 (n) the homicide was committed:

174 (i) by means of a destructive device, bomb, explosive, incendiary device, or similar  
175 device which was planted, hidden, or concealed in any place, area, dwelling, building, or  
176 structure, or was mailed or delivered; or

177 (ii) by means of any weapon of mass destruction as defined in Section 76-10-401;

178 (o) the homicide was committed during the act of unlawfully assuming control of any  
179 aircraft, train, or other public conveyance by use of threats or force with intent to obtain any  
180 valuable consideration for the release of the public conveyance or any passenger, crew  
181 member, or any other person aboard, or to direct the route or movement of the public  
182 conveyance or otherwise exert control over the public conveyance;

183 (p) the homicide was committed by means of the administration of a poison or of any  
184 lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

185 (q) the victim was a person held or otherwise detained as a shield, hostage, or for  
186 ransom;

187 (r) the homicide was committed in an especially heinous, atrocious, cruel, or  
188 exceptionally depraved manner, any of which must be demonstrated by physical torture,  
189 serious physical abuse, or serious bodily injury of the victim before death;

190 (s) the actor dismembers, mutilates, or disfigures the victim's body, whether before or  
191 after death, in a manner demonstrating the actor's depravity of mind; or

192 (t) the victim was younger than 14 years of age.

193 (2) Criminal homicide constitutes aggravated murder if the actor, with reckless  
194 indifference to human life, causes the death of another incident to an act, scheme, course of  
195 conduct, or criminal episode during which the actor is a major participant in the commission  
196 or attempted commission of:

197 (a) child abuse, Subsection 76-5-109(2)(a);

- 198 (b) child kidnapping, Section 76-5-301.1;
- 199 (c) rape of a child, Section 76-5-402.1;
- 200 (d) object rape of a child, Section 76-5-402.3;
- 201 (e) sodomy on a child, Section 76-5-403.1; or
- 202 (f) sexual abuse or aggravated sexual abuse of a child, Section 76-5-404.1.
- 203 (3) (a) If a notice of intent to seek the death penalty has been filed, aggravated murder
- 204 is a capital felony.
- 205 (b) If a notice of intent to seek the death penalty has not been filed, aggravated murder
- 206 is a noncapital first degree felony punishable by imprisonment for life without parole or by an
- 207 indeterminate term of not less than 20 years and which may be for life.
- 208 (c) (i) Within 60 days after arraignment of the defendant, the prosecutor may file
- 209 notice of intent to seek the death penalty. The notice shall be served on the defendant or
- 210 defense counsel and filed with the court.
- 211 (ii) Notice of intent to seek the death penalty may be served and filed more than 60
- 212 days after the arraignment upon written stipulation of the parties or upon a finding by the court
- 213 of good cause.
- 214 (d) Without the consent of the prosecutor, the court may not accept a plea of guilty to
- 215 noncapital first degree felony aggravated murder during the period in which the prosecutor
- 216 may file a notice of intent to seek the death penalty under Subsection (3)(c)(i).
- 217 (4) (a) It is an affirmative defense to a charge of aggravated murder or attempted
- 218 aggravated murder that the defendant caused the death of another or attempted to cause the
- 219 death of another:
- 220 (i) under the influence of extreme emotional distress for which there is a reasonable
- 221 explanation or excuse; or
- 222 (ii) under a reasonable belief that the circumstances provided a legal justification or
- 223 excuse for the defendant's conduct although the conduct was not legally justifiable or
- 224 excusable under the existing circumstances.
- 225 (b) Under Subsection (4)(a)(i), emotional distress does not include:



226 (i) a condition resulting from mental illness as defined in Section 76-2-305; or  
227 (ii) distress that is substantially caused by the defendant's own conduct.  
228 (c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the  
229 reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the  
230 viewpoint of a reasonable person under the then existing circumstances.

231 (d) This affirmative defense reduces charges only as follows:

- 232 (i) aggravated murder to murder; and
- 233 (ii) attempted aggravated murder to attempted murder.

234 (5) (a) Any aggravating circumstance described in Subsection (1) or (2) that  
235 constitutes a separate offense does not merge with the crime of aggravated murder.

236 (b) A person who is convicted of aggravated murder, based on an aggravating  
237 circumstance described in Subsection (1) or (2) that constitutes a separate offense, may also be  
238 convicted of, and punished for, the separate offense.

239 Section 3. Section **76-9-802** is amended to read:

240 **76-9-802. Definitions.**

241 As used in this part:

242 (1) "Criminal street gang" means an organization, association in fact, or group of three  
243 or more persons, whether operated formally or informally:

- 244 (a) that is currently in operation;
- 245 (b) that has as one of its primary activities the commission of one or more predicate  
246 gang crimes;

247 (c) that has, as a group, an identifying name or identifying sign or symbol, or both;

248 and

249 (d) whose members, acting individually or in concert with other members, engage in  
250 or have engaged in a pattern of criminal gang activity.

251 (2) "Intimidate" means the use of force, duress, violence, coercion, menace, or threat  
252 of harm for the purpose of causing an individual to act or refrain from acting.

253 (3) "Minor" means a person younger than 18 years of age.

- 254 (4) "Pattern of criminal gang activity" means:
- 255 (a) committing, attempting to commit, conspiring to commit, or soliciting the
- 256 commission of two or more predicate gang crimes within five years;
- 257 (b) the predicate gang crimes are:
- 258 (i) committed by two or more persons; or
- 259 (ii) committed by an individual at the direction of, or in association with a criminal
- 260 street gang; and
- 261 (c) the criminal activity was committed with the specific intent to promote, further, or
- 262 assist in any criminal conduct by members of the criminal street gang.
- 263 (5) (a) "Predicate gang crime" means any of the following offenses:
- 264 (i) any criminal violation of the following provisions:
- 265 (A) Title 58, Chapter 37, Utah Controlled Substances Act;
- 266 (B) Title 58, Chapter 37a, Utah Drug Paraphernalia Act;
- 267 (C) Title 58, Chapter 37b, Imitation Controlled Substances Act; or
- 268 (D) Title 58, Chapter 37c, Utah Controlled Substance Precursor Act;
- 269 (ii) Sections 76-5-102 through 76-5-103.5, which address assault offenses;
- 270 (iii) Title 76, Chapter 5, Part 2, Criminal Homicide;
- 271 (iv) Sections 76-5-301 through 76-5-304, which address kidnapping and related
- 272 offenses;
- 273 (v) any felony offense under Title 76, Chapter 5, Part 4, Sexual Offenses;
- 274 (vi) Title 76, Chapter 6, Part 1, Property Destruction;
- 275 (vii) Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass;
- 276 (viii) Title 76, Chapter 6, Part 3, Robbery;
- 277 (ix) any felony offense under Title 76, Chapter 6, Part 4, Theft, or under Title 76,
- 278 Chapter 6, Part 6, Retail Theft, except Sections 76-6-404.5, 76-6-405, 76-6-407, 76-6-408,
- 279 76-6-409, 76-6-409.1, 76-6-409.3, 76-6-409.6, 76-6-409.7, 76-6-409.8, 76-6-409.9, 76-6-410,
- 280 and 76-6-410.5;
- 281 (x) Title 76, Chapter 6, Part 5, Fraud, except Sections 76-6-504, 76-6-505, 76-6-507,

282 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514, 76-6-516, 76-6-517,  
283 76-6-518, and 76-6-520;

284 (xi) Title 76, Chapter 6, Part 11, Identity Fraud Act;

285 (xii) Title 76, Chapter 8, Part 3, Obstructing Governmental Operations, except  
286 Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

287 (xiii) Section 76-8-508, which includes tampering with a witness;

288 (xiv) Section 76-8-508.3, which includes retaliation against a witness or victim;

289 (xv) Section 76-8-509, which includes extortion or bribery to dismiss a criminal  
290 proceeding;

291 (xvi) Title 76, Chapter 10, Part 3, [~~which addresses explosives~~] Explosives;

292 (xvii) Title 76, Chapter 10, Part 5, Weapons;

293 (xviii) Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;

294 (xix) Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;

295 (xx) Section 76-10-1801, which addresses communications fraud;

296 (xxi) Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction  
297 Reporting Act;

298 (xxii) Section 76-10-2002, which addresses burglary of a research facility;

299 (xxiii) Title 41, Chapter 1a, Motor Vehicle Act:

300 (A) Section 41-1a-1313, regarding possession of a motor vehicle without an  
301 identification number;

302 (B) Section 41-1a-1315, regarding false evidence of title and registration;

303 (C) Section 41-1a-1316, regarding receiving or transferring stolen vehicles;

304 (D) Section 41-1a-1317, regarding selling or buying a motor vehicle without an  
305 identification number; and

306 (E) Section 41-1a-1318, regarding the fraudulent alteration of an identification  
307 number.

308 (b) "Predicate gang crime" also includes:

309 (i) any state or federal criminal offense that by its nature involves a substantial risk

310 that physical force may be used against another in the course of committing the offense; and  
311 (ii) any felony violation of a criminal statute of any other state, the United States, or  
312 any district, possession, or territory of the United States which would constitute a violation of  
313 any offense in Subsection (4)(a) if committed in this state.

314 Section 4. Section **76-10-508.1** is amended to read:

315 **76-10-508.1. Felony discharge of a firearm -- Penalties.**

316 (1) Except as provided under Subsection (2) or (3), a person who discharges a firearm  
317 [~~under any of the circumstances not amounting to criminal homicide or attempted criminal~~  
318 ~~homicide~~] is guilty of a third degree felony punishable by imprisonment for a term of not less  
319 than three years nor more than five years if:

320 (a) the actor discharges a firearm in the direction of any person or persons, knowing or  
321 having reason to believe that any person may be endangered by the discharge of the firearm;

322 (b) the actor, with intent to intimidate or harass another or with intent to damage a  
323 habitable structure as defined in Section 76-6-101, discharges a firearm in the direction of any  
324 person or habitable structure; or

325 (c) the actor, with intent to intimidate or harass another, discharges a firearm in the  
326 direction of any vehicle.

327 (2) A violation of Subsection (1) which causes bodily injury to any person is a second  
328 degree felony punishable by imprisonment for a term of not less than three years nor more than  
329 [~~fifteen~~] 15 years.

330 (3) A violation of Subsection (1) which causes serious bodily injury to any person is a  
331 first degree felony.

332 (4) In addition to any other penalties for a violation of this section, the court shall:

333 (a) notify the Driver License Division of the conviction for purposes of any  
334 revocation, denial, suspension, or disqualification of a driver license under Subsection  
335 53-3-220(1)(a)(xi); and

336 (b) specify in court at the time of sentencing the length of the revocation under  
337 Subsection 53-3-225(1)(c).

- 338           (5) This section does not apply to a person:
- 339           (a) who discharges any kind of firearm when that person is in lawful defense of self or
- 340 others;
- 341           (b) who is performing official duties as provided in Section 23-20-1.5 or 76-10-523 or
- 342 as otherwise authorized by law; or
- 343           (c) who discharges a dangerous weapon or firearm from an automobile or other
- 344 vehicle, if:
- 345           (i) the discharge occurs at a firing range or training ground;
- 346           (ii) at no time after the discharge does the projectile that is discharged cross over or
- 347 stop at a location other than within the boundaries of the firing range or training ground
- 348 described in Subsection (5)(c)(i);
- 349           (iii) the discharge is made as practice or training for a lawful purpose;
- 350           (iv) the discharge and the location, time, and manner of the discharge are approved by
- 351 the owner or operator of the firing range or training ground prior to the discharge; and
- 352           (v) the discharge is not made in violation of Subsection (1).