

**HOMICIDE PENALTY AMENDMENT**

2010 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Carl Wimmer**

Senate Sponsor: Jon J. Greiner

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**LONG TITLE**

**General Description:**

This bill modifies the Criminal Code by amending specified felony penalties to maintain consistency with other sections.

**Highlighted Provisions:**

This bill:

- ▶ amends the penalty for specified non-capital first degree felonies from 20 years and which may be for life, to 25 years and which may be for life, to be consistent with the same amendment made to Sections 76-3-206 and 76-3-207.7 in H.B. 317, Capital Felony Amendments, which passed during the 2009 General Session.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**76-3-207**, as last amended by Laws of Utah 2007, Chapter 275

**76-5-202**, as last amended by Laws of Utah 2009, Chapters 157 and 206

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

Section 1. Section **76-3-207** is amended to read:

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

(1) (a) When a defendant has pled guilty to or been found guilty of a capital felony,

30 there shall be further proceedings before the court or jury on the issue of sentence.

31 (b) In the case of a plea of guilty to a capital felony, the sentencing proceedings shall  
32 be conducted before a jury or, upon request of the defendant and with the approval of the court  
33 and the consent of the prosecution, by the court which accepted the plea.

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

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

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

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

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

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

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

48 without comparison to other persons or victims; and

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

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

54 (3) Aggravating circumstances include those outlined in Section 76-5-202.

55 (4) Mitigating circumstances include:

56 (a) the defendant has no significant history of prior criminal activity;

57 (b) the homicide was committed while the defendant was under the influence of

58 mental or emotional disturbance;

59 (c) the defendant acted under duress or under the domination of another person;

60 (d) at the time of the homicide, the capacity of the defendant to appreciate the  
61 wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired  
62 as a result of a mental condition, intoxication, or influence of drugs, except that "mental  
63 condition" under this Subsection (4)(d) does not mean an abnormality manifested primarily by  
64 repeated criminal conduct;

65 (e) the youth of the defendant at the time of the crime;

66 (f) the defendant was an accomplice in the homicide committed by another person and  
67 the defendant's participation was relatively minor; and

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

69 (5) (a) The court or jury, as the case may be, shall retire to consider the penalty.

70 Except as provided in Subsection 76-3-207.5(2), in all proceedings before a jury, under this  
71 section, it shall be instructed as to the punishment to be imposed upon a unanimous decision  
72 for death and that the penalty of either an indeterminate prison term of not less than ~~[20]~~ 25  
73 years and which may be for life or life in prison without parole, shall be imposed if a  
74 unanimous decision for death is not found.

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

81 (c) If the jury is unable to reach a unanimous decision imposing the sentence of death,  
82 the jury shall then determine whether the penalty of life in prison without parole shall be  
83 imposed, except as provided in Subsection 76-3-207.5(2). The penalty of life in prison  
84 without parole shall only be imposed if the jury determines that the sentence of life in prison  
85 without parole is appropriate. If the jury reports agreement by 10 jurors or more to impose the

86 sentence of life in prison without parole, the court shall discharge the jury and shall impose the  
87 sentence of life in prison without parole. If 10 jurors or more do not agree upon a sentence of  
88 life in prison without parole, the court shall discharge the jury and impose an indeterminate  
89 prison term of not less than [~~20~~] 25 years and which may be for life.

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

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

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

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

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

111 (c) judge, and the original trial judge is unable or unavailable to conduct a new  
112 sentencing proceeding, then another judge shall be designated to conduct the new sentencing  
113 proceeding, and the new proceeding will be before a jury unless the defendant waives the

114 hearing before the jury with the approval of the court and the consent of the prosecution.

115 (7) If the penalty of death is held to be unconstitutional by the Utah Supreme Court or  
116 the United States Supreme Court, the court having jurisdiction over a person previously  
117 sentenced to death for a capital felony shall cause the person to be brought before the court,  
118 and the court shall sentence the person to life in prison without parole.

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

125 (b) If the appellate court precludes the imposition of the death penalty under  
126 Subsection (8)(a), but the appellate court finds that sentencing the defendant to life in prison  
127 without parole is likely to result in a manifest injustice, it may remand the case to the  
128 sentencing court for further sentencing proceedings to determine if the defendant should serve  
129 a sentence of life in prison without parole or an indeterminate prison term of not less than [20]  
130 25 years and which may be for life.

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

132 **76-5-202. Aggravated murder.**

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

135 (a) the homicide was committed by a person who is confined in a jail or other  
136 correctional institution;

137 (b) the homicide was committed incident to one act, scheme, course of conduct, or  
138 criminal episode during which two or more persons were killed, or during which the actor  
139 attempted to kill one or more persons in addition to the victim who was killed;

140 (c) the actor knowingly created a great risk of death to a person other than the victim  
141 and the actor;

142 (d) the homicide was committed incident to an act, scheme, course of conduct, or  
143 criminal episode during which the actor committed or attempted to commit aggravated  
144 robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy,  
145 sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse  
146 of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault,  
147 aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping,  
148 or child kidnapping;

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

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

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

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

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

160 (i) aggravated murder under this section;

161 (ii) attempted aggravated murder under this section;

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

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

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

166 (j) the actor was previously convicted of:

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

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

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

- 170 (iv) child kidnapping, Section 76-5-301.1;
- 171 (v) aggravated kidnapping, Section 76-5-302;
- 172 (vi) rape, Section 76-5-402;
- 173 (vii) rape of a child, Section 76-5-402.1;
- 174 (viii) object rape, Section 76-5-402.2;
- 175 (ix) object rape of a child, Section 76-5-402.3;
- 176 (x) forcible sodomy, Section 76-5-403;
- 177 (xi) sodomy on a child, Section 76-5-403.1;
- 178 (xii) aggravated sexual abuse of a child, Section 76-5-404.1;
- 179 (xiii) aggravated sexual assault, Section 76-5-405;
- 180 (xiv) aggravated arson, Section 76-6-103;
- 181 (xv) aggravated burglary, Section 76-6-203;
- 182 (xvi) aggravated robbery, Section 76-6-302;
- 183 (xvii) felony discharge of a firearm, Section 76-10-508.1; or
- 184 (xviii) an offense committed in another jurisdiction which if committed in this state
- 185 would be a violation of a crime listed in this Subsection (1)(j);
- 186 (k) the homicide was committed for the purpose of:
- 187 (i) preventing a witness from testifying;
- 188 (ii) preventing a person from providing evidence or participating in any legal
- 189 proceedings or official investigation;
- 190 (iii) retaliating against a person for testifying, providing evidence, or participating in
- 191 any legal proceedings or official investigation; or
- 192 (iv) disrupting or hindering any lawful governmental function or enforcement of laws;
- 193 (l) the victim is or has been a local, state, or federal public official, or a candidate for
- 194 public office, and the homicide is based on, is caused by, or is related to that official position,
- 195 act, capacity, or candidacy;
- 196 (m) the victim is or has been a peace officer, law enforcement officer, executive
- 197 officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official,

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

201 (n) the homicide was committed:

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

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

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

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

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

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

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

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

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

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



226 (b) child kidnapping, Section 76-5-301.1;

227 (c) rape of a child, Section 76-5-402.1;

228 (d) object rape of a child, Section 76-5-402.3;

229 (e) sodomy on a child, Section 76-5-403.1; or

230 (f) sexual abuse or aggravated sexual abuse of a child, Section 76-5-404.1.

231 (3) (a) If a notice of intent to seek the death penalty has been filed, aggravated murder  
232 is a capital felony.

233 (b) If a notice of intent to seek the death penalty has not been filed, aggravated murder  
234 is a noncapital first degree felony punishable ~~[by imprisonment for life without parole or by an~~  
235 ~~indeterminate term of not less than 20 years and which may be for life]~~ as provided in Section  
236 76-3-207.7.

237 (c) (i) Within 60 days after arraignment of the defendant, the prosecutor may file  
238 notice of intent to seek the death penalty. The notice shall be served on the defendant or  
239 defense counsel and filed with the court.

240 (ii) Notice of intent to seek the death penalty may be served and filed more than 60  
241 days after the arraignment upon written stipulation of the parties or upon a finding by the court  
242 of good cause.

243 (d) Without the consent of the prosecutor, the court may not accept a plea of guilty to  
244 noncapital first degree felony aggravated murder during the period in which the prosecutor  
245 may file a notice of intent to seek the death penalty under Subsection (3)(c)(i).

246 (4) (a) It is an affirmative defense to a charge of aggravated murder or attempted  
247 aggravated murder that the defendant caused the death of another or attempted to cause the  
248 death of another under a reasonable belief that the circumstances provided a legal justification  
249 or excuse for the conduct although the conduct was not legally justifiable or excusable under  
250 the existing circumstances.

251 (b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from  
252 the viewpoint of a reasonable person under the then existing circumstances.

253 (c) This affirmative defense reduces charges only as follows:

254 (i) aggravated murder to murder; and

255 (ii) attempted aggravated murder to attempted murder.

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

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