

30 period of imprisonment;

31 ▶ provides that the financial assistance amount shall be the monetary equivalent of the
32 average annual wage for a single wage earner in Utah for each year of imprisonment,
33 for a maximum of 15 years of imprisonment; and

34 ▶ provides that a petitioner found to be factually innocent shall receive two years'
35 financial assistance in a lump sum, and the balance shall be paid out quarterly to the
36 person from the Commission on Criminal and Juvenile Justice beginning no later
37 than one year after the legislative appropriation of the funds is made and ending no
38 later than ten years after the appropriation is made.

39 **Monies Appropriated in this Bill:**

40 None

41 **Other Special Clauses:**

42 None

43 **Utah Code Sections Affected:**

44 AMENDS:

45 **78-35a-107**, as last amended by Laws of Utah 2004, Chapter 139

46 **78-35a-301**, as last amended by Laws of Utah 2007, Chapter 125

47 **78-35a-303**, as enacted by Laws of Utah 2001, Chapter 261

48 ENACTS:

49 **78-35a-300.5**, Utah Code Annotated 1953

50 **78-35a-401**, Utah Code Annotated 1953

51 **78-35a-402**, Utah Code Annotated 1953

52 **78-35a-403**, Utah Code Annotated 1953

53 **78-35a-404**, Utah Code Annotated 1953

54 **78-35a-405**, Utah Code Annotated 1953



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

57 Section 1. Section **78-35a-107** is amended to read:

58 **78-35a-107. Statute of limitations for postconviction relief.**

59 (1) A petitioner is entitled to relief only if the petition is filed within one year after the
60 cause of action has accrued.

61 (2) For purposes of this section, the cause of action accrues on the latest of the
62 following dates:

63 (a) the last day for filing an appeal from the entry of the final judgment of conviction, if
64 no appeal is taken;

65 (b) the entry of the decision of the appellate court which has jurisdiction over the case,
66 if an appeal is taken;

67 (c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or
68 the United States Supreme Court, if no petition for writ of certiorari is filed;

69 (d) the entry of the denial of the petition for writ of certiorari or the entry of the
70 decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

71 (e) the date on which petitioner knew or should have known, in the exercise of
72 reasonable diligence, of evidentiary facts on which the petition is based.

73 (3) If the court finds that the interests of justice require, a court may excuse a
74 petitioner's failure to file within the time limitations.

75 (4) The statute of limitations is tolled during the pendency of the outcome of a petition
76 asserting:

77 (a) exoneration through DNA testing under Section 78-35a-303; or

78 (b) factual innocence under Section 78-35a-401.

79 [~~4~~] (5) Sections 77-19-8, 78-12-35, and 78-12-40 do not extend the limitations period
80 established in this section.

81 Section 2. Section **78-35a-300.5** is enacted to read:

82 **Part 3. Postconviction DNA Testing**

83 **78-35a-300.5. Title.**

84 This part is known as "Postconviction DNA Testing."

85 Section 3. Section **78-35a-301** is amended to read:

86 **78-35a-301. Postconviction testing of DNA -- Petition -- Sufficient allegations --**
87 **Notification of victim.**

88 (1) As used in this part[;]:

89 (a) "DNA" means deoxyribonucleic acid.

90 (b) "Factually innocent" has the same definition as in Section 78-35a-402.

91 (2) A person convicted of a felony offense may at any time file a petition for
92 postconviction DNA testing in the trial court that entered the judgment of conviction [~~against~~
93 ~~him~~] if the person asserts [~~his actual~~] factual innocence under oath and the petition alleges:

94 (a) evidence has been obtained regarding the person's case which is still in existence and
95 is in a condition that allows DNA testing to be conducted;

96 (b) the chain of custody is sufficient to establish that the evidence has not been altered
97 in any material aspect;

98 (c) the person identifies the specific evidence to be tested and states a theory of defense,
99 not inconsistent with theories previously asserted at trial, that the requested DNA testing would
100 support;

101 (d) the evidence was not previously subjected to DNA testing, or if the evidence was
102 tested previously, the evidence was not subjected to the testing that is now requested, and the
103 new testing may resolve an issue not resolved by the prior testing;

104 (e) the proposed DNA testing is generally accepted as valid in the scientific field or is
105 otherwise admissible under Utah law;

106 (f) the evidence that is the subject of the request for testing has the potential to produce
107 new, noncumulative evidence that will establish the person's [~~actual~~] factual innocence; and

108 (g) the person is aware of the consequences of filing the petition, including:

109 (i) those specified in Sections 78-35a-302 and 78-35a-304; and

110 (ii) that the person is waiving any statute of limitations in all jurisdictions as to any
111 felony offense [~~he~~] the person has committed which is identified through DNA database
112 comparison.

113 (3) The petition under Subsection (2) shall [~~be in compliance~~] comply with Rule 65C,

114 Utah Rules of Civil Procedure, including providing the underlying criminal case number.

115 (4) The court may not order DNA testing in cases in which DNA testing was available
116 at the time of trial and the person did not request DNA testing or present DNA evidence for
117 tactical reasons.

118 (5) After a petition is filed under this section, prosecutors, law enforcement officers,
119 and crime laboratory personnel have a duty to cooperate in preserving evidence and in
120 determining the sufficiency of the chain of custody of the evidence which may be subject to
121 DNA testing.

122 (6) (a) A person who files a petition under this section shall serve notice upon the office
123 of the prosecutor who obtained the conviction, and upon the ~~[state]~~ Utah attorney general. The
124 attorney general shall, within 30 days after receipt of service of a copy of the petition, or within
125 any additional period of time the court allows, answer or otherwise respond to all proceedings
126 initiated under this part.

127 (b) After the attorney general is given an opportunity to respond to a petition for
128 postconviction DNA testing, the court shall order DNA testing if it finds by a preponderance of
129 the evidence that all criteria of Subsection (2) have been met.

130 (7) (a) If the court grants the petition for testing, the DNA test shall be performed by
131 the Utah State Crime Laboratory within the Criminal Investigations and Technical Services
132 Division created in Section 53-10-103, unless the person establishes that the state crime
133 laboratory has a conflict of interest or does not have the capability to perform the necessary
134 testing.

135 (b) If the court orders that the testing be conducted by any laboratory other than the
136 state crime laboratory, the court shall require that the testing be performed:

137 (i) under reasonable conditions designed to protect the state's interests in the integrity
138 of the evidence; and

139 (ii) according to accepted scientific standards and procedures.

140 (8) (a) DNA testing under this section shall be paid for from funds appropriated to the
141 Department of Corrections under Subsection 53-10-407(4)(a) from the DNA Specimen

142 Restricted Account created in Section 53-10-407 if:

143 (i) the court ordered the DNA testing under this section;

144 (ii) the Utah State Crime Laboratory within the Criminal Investigations and Technical
145 Services Division has a conflict of interest or does not have the capability to perform the
146 necessary testing; and

147 (iii) the petitioner who has filed for postconviction DNA testing under Section
148 78-35a-201 is serving a sentence of imprisonment and is indigent.

149 (b) Under this Subsection (8), costs of DNA testing include those necessary to
150 transport the evidence, prepare samples for analysis, analyze the evidence, and prepare reports
151 of findings.

152 (9) If the person is serving a sentence of imprisonment and is indigent, the state shall
153 pay for the costs of the testing under this part, but if the result is not favorable to the person the
154 court may order the person to reimburse the state for the costs of the testing, pursuant to the
155 provisions of Subsections 78-35a-302(4) and 78-35a-304(1)(b).

156 (10) Any victim of the crime regarding which the person petitions for DNA testing,
157 who has elected to receive notice under Section 77-38-3 shall be notified by the state's attorney
158 of any hearing regarding the petition and testing, even though the hearing is a civil proceeding.

159 Section 4. Section **78-35a-303** is amended to read:

160 **78-35a-303. Consequences of postconviction DNA testing when result is favorable**
161 **to person -- Opposition by the state -- Procedures.**

162 (1) (a) If the result of postconviction DNA testing is favorable to the person, the person
163 may file a motion to vacate [~~his~~] the conviction. The court shall give the state 30 days to
164 respond in writing, to present evidence, and to be heard in oral argument prior to issuing an
165 order to vacate the conviction. The state may by motion request an extension of the 30 days,
166 which the court may grant upon good cause shown.

167 (b) The state may stipulate to the conviction being vacated, or may request a hearing
168 and attempt to demonstrate through evidence and argument that, despite the DNA test results,
169 the state possesses sufficient evidence of the person's guilt so that [~~he~~] the person is unable to

170 demonstrate by clear and convincing evidence that ~~[he]~~ the person is ~~[actually]~~ factually
171 innocent of one or more offenses of which ~~[he]~~ the person was convicted, and all the lesser
172 included offenses related to those offenses.

173 (2) (a) (i) If the result of postconviction DNA testing is favorable to the person and the
174 state opposes vacating the conviction, the court shall consider all the evidence presented at the
175 original trial and at the hearing under Subsection (1)(b), including the new DNA test result.
176 ~~[Evidence that would otherwise have been suppressed at criminal trial is admissible, unless the~~
177 ~~evidence is an unconstitutionally coerced statement from the person.]~~

178 (ii) The court may consider:

179 (A) evidence that was suppressed or would be suppressed at a criminal trial; and

180 (B) hearsay evidence, and may consider that the evidence is hearsay in evaluating its
181 weight and credibility.

182 (b) If the court, after considering all the evidence, determines that the DNA test result
183 demonstrates by clear and convincing evidence that the person is ~~[actually]~~ factually innocent of
184 one or more offenses of which the person was convicted ~~[and all lesser included offenses~~
185 ~~relating to those offenses]~~, the court shall order that those convictions be vacated with prejudice
186 and those convictions be expunged from the person's record.

187 (c) If the court, after considering all the evidence presented at the original trial and at
188 the hearing under Subsection (1)(b), including the new DNA test result, finds by clear and
189 convincing evidence that the person ~~[is actually innocent of]~~ did not commit one or more
190 offenses of which the person was convicted, but the court does not find by clear and convincing
191 evidence that the person ~~[is actually innocent of all]~~ did not commit any lesser included offenses
192 relating to those offenses, the court shall modify the original conviction and sentence of the
193 person as appropriate for the lesser included offense, whether or not the lesser included offense
194 was originally submitted to the trier of fact.

195 (d) If the court, after considering all the evidence presented at the original trial and at
196 the hearing under Subsection (1)(b), including the new DNA test result, does not find by clear
197 and convincing evidence that the person is ~~[actually]~~ factually innocent of the offense or

198 offenses the person is challenging and does not find that Subsection (2)(c) applies, the court
199 shall deny the person's petition regarding the offense or offenses.

200 (e) Any party may appeal from the trial court's final ruling on the petition under this
201 part.

202 Section 5. Section **78-35a-401** is enacted to read:

203 **Part 4. Postconviction Determination of Factual Innocence**

204 **78-35a-401. Title.**

205 This part is known as "Postconviction Determination of Factual Innocence."

206 Section 6. Section **78-35a-402** is enacted to read:

207 **78-35a-402. Petition for determination of factual innocence -- Sufficient**
208 **allegations -- Notification of victim.**

209 As used in this part:

210 (1) "Factually innocent" means a person did not:

211 (a) engage in the conduct for which the person was convicted;

212 (b) engage in conduct relating to any lesser included offenses; or

213 (c) commit any other felony arising out of or reasonably connected to the facts
214 supporting the indictment or information upon which the person was convicted.

215 (2) (a) A person who has been convicted of a felony offense may petition the district
216 court in the county in which the person was convicted for a hearing to establish that the person
217 is factually innocent of the crime or crimes of which the person was convicted, if the person
218 asserts factual innocence under oath and the petition alleges:

219 (i) newly discovered material evidence exists that establishes that the petitioner is
220 factually innocent;

221 (ii) the petitioner identifies the specific evidence the petitioner claims establishes
222 innocence;

223 (iii) the material evidence is not merely cumulative of evidence that was known;

224 (iv) the material evidence is not merely impeachment evidence;

225 (v) viewed with all the other evidence, the newly discovered evidence demonstrates that

226 the petitioner is factually innocent; and

227 (vi) (A) neither the petitioner nor petitioner's counsel knew of the evidence at the time
228 of trial or sentencing or in time to include the evidence in any previously filed post-trial motion
229 or postconviction motion, and the evidence could not have been discovered by the petitioner or
230 the petitioner's counsel through the exercise of reasonable diligence;

231 (B) a court has found ineffective assistance of counsel for failing to exercise reasonable
232 diligence in uncovering the evidence; or

233 (C) the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in the
234 interest of justice.

235 (b) A person who has already obtained postconviction relief that vacated or reversed
236 the person's conviction may also file a petition under this part if no retrial or appeal regarding
237 this offense is pending.

238 (3) If some or all of the evidence alleged to be exonerating is biological evidence
239 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78-35a-301.

240 (4) The petition shall be in compliance with Rule 65C, Utah Rules of Civil Procedure,
241 and shall include the underlying criminal case number.

242 (5) After a petition is filed under this section, prosecutors, law enforcement officers,
243 and crime laboratory personnel shall cooperate in preserving evidence and in determining the
244 sufficiency of the chain of custody of the evidence which is the subject of the petition.

245 (6) (a) A person who files a petition under this section shall serve notice of the petition
246 and a copy of the petition upon the office of the prosecutor who obtained the conviction and
247 upon the Utah attorney general. The attorney general shall, within 30 days after receipt of
248 service of the notice, or within any additional period of time the court allows, answer or
249 otherwise respond to all proceedings initiated under this part.

250 (b) (i) After the time for response by the attorney general under Subsection (6)(a) has
251 passed, the court shall order a hearing if it finds there is a bona fide issue as to whether the
252 petitioner is factually innocent of the charges of which the petitioner was convicted.

253 (ii) If the parties stipulate that the evidence establishes that the petitioner is factually

254 innocent, the court may find the petitioner is factually innocent without holding a hearing.

255 (7) The court may not grant a petition for a hearing under this part during the period in
256 which criminal proceedings in the matter are pending before any trial or appellate court, unless
257 stipulated to by the parties.

258 (8) Any victim of a crime that is the subject of a petition under this part, and who has
259 elected to receive notice under Section 77-38-3, shall be notified by the state's attorney of any
260 hearing regarding the petition.

261 Section 7. Section **78-35a-403** is enacted to read:

262 **78-35a-403. Requests for appointment of counsel -- Appeals -- Postconviction**
263 **petitions.**

264 (1) Subsections 78-35a-109(1) and (2), regarding the appointment of pro bono counsel,
265 apply to any request for the appointment of counsel under this part.

266 (2) Subsection 78-35a-109(3), regarding effectiveness of counsel, applies to subsequent
267 postconviction petitions and to appeals under this part.

268 Section 8. Section **78-35a-404** is enacted to read:

269 **78-35a-404. Hearing upon petition -- Procedures -- Court determination of factual**
270 **innocence.**

271 (1) (a) In any hearing conducted under this part, the Utah attorney general shall
272 represent the state.

273 (b) The burden is upon the petitioner to establish the petitioner's factual innocence by
274 clear and convincing evidence.

275 (2) The court may consider:

276 (a) evidence that was suppressed or would be suppressed at a criminal trial; and

277 (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its
278 weight and credibility.

279 (3) In making its determination the court shall consider, in addition to the evidence
280 presented at the hearing under this part, all the evidence presented at the original trial and at any
281 postconviction proceedings in the case.

282 (4) If the court, after considering all the evidence, determines by clear and convincing
283 evidence that the petitioner:

284 (a) is factually innocent of one or more offenses of which the petitioner was convicted,
285 the court shall order that those convictions:

286 (i) be vacated with prejudice; and

287 (ii) be expunged from the petitioner's record; or

288 (b) did not commit one or more offenses of which the petitioner was convicted, but the
289 court does not find by clear and convincing evidence that the petitioner did not commit any
290 lesser included offenses relating to those offenses, the court shall modify the original conviction
291 and sentence of the petitioner as appropriate for the lesser included offense, whether or not the
292 lesser included offense was originally submitted to the trier of fact.

293 (5) (a) If the court, after considering all the evidence, does not determine by clear and
294 convincing evidence that the petitioner is factually innocent of the offense or offenses the
295 petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny
296 the petition regarding the offense or offenses.

297 (b) If the court finds that the petition was brought in bad faith, it shall enter the finding
298 on the record, and the petitioner may not file a second or successive petition under this section
299 without first applying to and obtaining permission from the court which denied the prior
300 petition.

301 Section 9. Section **78-35a-405** is enacted to read:

302 **78-35a-405. Judgment and assistance payment.**

303 (1) (a) If a court finds a petitioner factually innocent under Title 78, Chapter 35a, Part
304 3, Postconviction DNA Testing, or under this part, and if the petitioner has served a period of
305 incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall
306 receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of
307 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah,
308 as determined by the data most recently published by the Department of Workforce Services at
309 the time of the petitioner's release from prison.

310 (b) As used in this Subsection (1), "petitioner" means a United States citizen or an
311 individual who was otherwise lawfully present in this country at the time of the incident that
312 gave rise to the underlying conviction.

313 (2) Payments pursuant to this section shall be made as follows:

314 (a) The Office of Crime Victim Reparations shall pay from the Crime Victim
315 Reparations Fund to the petitioner within 45 days of the court order under Subsection (1) an
316 initial sum equal to either 20% of the total financial assistance payment as determined under
317 Subsection (1) or an amount equal to two years of incarceration, whichever is greater, but not
318 to exceed the total amount owed.

319 (b) The Legislature shall appropriate as nonlapsing funds from the General Fund, and
320 no later than the next general session following the issuance of the court order under Subsection
321 (1):

322 (i) to the Crime Victim Reparations Fund, the amount that was paid out of the fund
323 under Subsection (2)(a); and

324 (ii) to the Commission on Criminal and Juvenile Justice, as a separate line item, the
325 amount ordered by the court for payments under Subsection (1), minus the amount reimbursed
326 to the Crime Victim Reparations Fund under Subsection (2)(b)(i).

327 (c) Payments to the petitioner under this section, other than the payment under
328 Subsection (2)(a), shall be made by the Commission on Criminal and Juvenile Justice quarterly
329 on or before the last day of the month next succeeding each calendar quarterly period.

330 (d) Payments under Subsection (2)(c) shall:

331 (i) commence no later than one year after the effective date of the appropriation for the
332 payments;

333 (ii) be made to the petitioner for the balance of the amount ordered by the court after
334 the initial payment under Subsection (2)(a); and

335 (iii) be allocated so that the entire amount due to the petitioner under this section has
336 been paid no later than ten years after the effective date of the appropriation made under
337 Subsection (2)(b).

338 (3) (a) Payments pursuant to this section shall be reduced to the extent that the period
339 of incarceration for which the petitioner seeks payment was attributable to a separate and lawful
340 conviction.

341 (b) (i) Payments pursuant to this section shall be tolled upon the commencement of any
342 period of incarceration due to the petitioner's subsequent conviction of a felony and shall
343 resume upon the conclusion of that period of incarceration.

344 (ii) As used in this section, "felony" means a criminal offense classified as a felony under
345 Title 76, Chapter 3, Punishments, or conduct that would constitute a felony if committed in
346 Utah.

347 (c) The reduction of payments pursuant to Subsection (3)(a) or the tolling of payments
348 pursuant to Subsection (3)(b) shall be determined by the same court that finds a petitioner to be
349 factually innocent under Title 78, Chapter 35a, Part 3, Postconviction DNA Testing, or this
350 part.

351 (4) (a) A person is ineligible for any payments under this part if the person was already
352 serving a prison sentence in another jurisdiction at the time of the conviction of the crime for
353 which that person has been found factually innocent pursuant to Title 78, Chapter 35a, Part 3,
354 Postconviction DNA Testing, or this part, and that person is to be returned to that other
355 jurisdiction upon release for further incarceration on the prior conviction.

356 (b) Ineligibility for any payments pursuant to this Subsection (4) shall be determined by
357 the same court that finds a person to be factually innocent under Title 78, Chapter 35a, Part 3,
358 Postconviction DNA Testing, or this part.

359 (5) Payments pursuant to this section:

360 (a) are not subject to any Utah state taxes; and

361 (b) may not be offset by any expenses incurred by the state or any political subdivision
362 of the state, including expenses incurred to secure the petitioner's custody, or to feed, clothe, or
363 provide medical services for the petitioner.

364 (6) If a court finds a petitioner to be factually innocent under Title 78, Chapter 35a,
365 Part 3, Postconviction DNA Testing, or this part, the court shall also:

366 (a) issue an order of expungement of the petitioner's criminal record for all acts in the
367 charging document upon which the payment under this part is based; and

368 (b) provide a letter to the petitioner explaining that the petitioner's conviction has been
369 vacated on the grounds of factual innocence and indicating that the petitioner did not commit
370 the crime or crimes for which the petitioner was convicted and was later found to be factually
371 innocent under Title 78, Chapter 35a, Part 3, Postconviction DNA Testing, or this part.

372 (7) A petitioner found to be factually innocent under Title 78, Chapter 35a, Part 3,
373 Postconviction DNA Testing, or this part shall have access to the same services and programs
374 available to Utah citizens generally as though the conviction for which the petitioner was found
375 to be factually innocent had never occurred.

376 (8) Payments pursuant to this part constitute a full and conclusive resolution of the
377 petitioner's claims on the specific issue of factual innocence.