

Part 4 Postconviction Determination of Factual Innocence

78B-9-401 Title.

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

Enacted by Chapter 358, 2008 General Session

78B-9-401.5 Definitions.

As used in this part:

- (1) "Bona fide and compelling issue of factual innocence" means that the newly discovered material evidence presented by the petitioner, if credible, would clearly establish the factual innocence of the petitioner.
- (2) "Factual innocence" or "factually innocent" means a person did not:
 - (a) engage in the conduct for which the person was convicted;
 - (b) engage in conduct relating to any lesser included offenses of the crime for which the person was convicted; or
 - (c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.
- (3) "Newly discovered material evidence" means evidence that was not available to the petitioner at trial or during the resolution on the merits by the trial court of any motion to withdraw a guilty plea or motion for new trial and which is relevant to the determination of the issue of factual innocence, and may also include:
 - (a) evidence which was discovered prior to or in the course of any appeal or postconviction proceedings that served in whole or in part as the basis for vacatur or reversal of the conviction of petitioner; or
 - (b) evidence that supports the claims within a petition filed under Part 1, General Provisions, which is pending at the time of the court's determination of factual innocence.
- (4) "Period of incarceration" means any sentence of imprisonment, including jail, which was served after judgement of conviction.

Enacted by Chapter 153, 2010 General Session

78B-9-402 Petition for determination of factual innocence -- Sufficient allegations -- Notification of victim -- Payment to surviving spouse.

- (1) A person who has been convicted of a felony offense may petition the district court in the county in which the person was convicted for a hearing to establish that the person is factually innocent of the crime or crimes of which the person was convicted.
- (2)
 - (a) The petition shall contain an assertion of factual innocence under oath by the petitioner and shall aver, with supporting affidavits or other credible documents, that:
 - (i) newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent;
 - (ii) the specific evidence identified by the petitioner in the petition establishes innocence;
 - (iii) the material evidence is not merely cumulative of evidence that was known;
 - (iv) the material evidence is not merely impeachment evidence; and

- (v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent.
- (b)
 - (i) The court shall review the petition in accordance with the procedures in Subsection (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a).
 - (ii) If the court finds the petition does not meet all the requirements of Subsection (2)(a), the court shall dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the attorney general.
- (3)
 - (a) The petition shall also contain an averment that:
 - (i) neither the petitioner nor the petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence; or
 - (ii) a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence.
 - (b)
 - (i) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the court shall then review the petition to determine if Subsection (3)(a) has been satisfied.
 - (ii) If the court finds that the requirements of Subsection (3)(a) have not been satisfied, the court may dismiss the petition without prejudice and give notice to the petitioner and the attorney general of the dismissal, or the court may waive the requirements of Subsection (3)(a) if the court finds the petition should proceed to hearing based upon the strength of the petition, and that there is other evidence that could have been discovered through the exercise of reasonable diligence by the petitioner or the petitioner's counsel at trial, and the other evidence:
 - (A) was not discovered by the petitioner or the petitioner's counsel;
 - (B) is material upon the issue of factual innocence; and
 - (C) has never been presented to a court.
- (4)
 - (a) If the conviction for which the petitioner asserts factual innocence was based upon a plea of guilty, the petition shall contain the specific nature and content of the evidence that establishes factual innocence.
 - (b) The court shall review the evidence and may dismiss the petition at any time in the course of the proceedings, if the court finds that the evidence of factual innocence relies solely upon the recantation of testimony or prior statements made by a witness against the petitioner, and the recantation appears to the court to be equivocal or self serving.
- (5) A person who has already obtained postconviction relief that vacated or reversed the person's conviction or sentence may also file a petition under this part in the same manner and form as described above, if no retrial or appeal regarding this offense is pending.
- (6) If some or all of the evidence alleged to be exonerating is biological evidence subject to DNA testing, the petitioner shall seek DNA testing in accordance with Section 78B-9-301.
- (7) Except as provided in Subsection (9), the petition and all subsequent proceedings shall be in compliance with and governed by Utah Rules of Civil Procedure, Rule 65C and shall include the underlying criminal case number.
- (8) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel shall cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which is the subject of the petition.

- (9)
- (a) A person who files a petition under this section shall serve notice of the petition and a copy of the petition upon the office of the prosecutor who obtained the conviction and upon the Utah attorney general.
 - (b)
 - (i) The assigned judge shall conduct an initial review of the petition.
 - (ii) If it is apparent to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in previous proceedings or presenting issues that appear frivolous or speculative on their face, the court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal upon the petitioner and the attorney general.
 - (iii) If, upon completion of the initial review, the court does not dismiss the petition, the court shall order the attorney general to file a response to the petition.
 - (iv) The attorney general shall, within 30 days after the day on which the attorney general receives the court's order, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.
 - (c)
 - (i) After the time for response by the attorney general under Subsection (9)(b) has passed, the court shall order a hearing if the court finds the petition meets the requirements of Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual innocence regarding the charges of which the petitioner was convicted.
 - (ii) No bona fide and compelling issue of factual innocence exists if the petitioner is merely relitigating facts, issues, or evidence presented in a previous proceeding or if the petitioner is unable to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes the petitioner's factual innocence.
 - (d)
 - (i) If the parties stipulate that the evidence establishes that the petitioner is factually innocent, the court may find the petitioner is factually innocent without holding a hearing.
 - (ii) If the state will not stipulate that the evidence establishes that the petitioner is factually innocent, no determination of factual innocence may be made by the court without first holding a hearing under this part.
- (10) The court may not grant a petition for a hearing under this part during the period in which criminal proceedings in the matter are pending before any trial or appellate court, unless stipulated to by the parties.
- (11) Any victim of a crime that is the subject of a petition under this part, and who has elected to receive notice under Section 77-38-3, shall be notified by the state's attorney of any hearing regarding the petition.
- (12)
- (a) A petition to determine factual innocence under this part, or Part 3, Postconviction Testing of DNA, shall be filed separately from any petition for postconviction relief under Part 1, General Provisions.
 - (b) Separate petitions may be filed simultaneously in the same court.
- (13) The procedures governing the filing and adjudication of a petition to determine factual innocence apply to all petitions currently filed or pending in the district court and any new petitions filed on or after June 1, 2012.
- (14)
- (a) As used in this Subsection (14) and in Subsection (15):
 - (i) "Married" means the legal marital relationship established between two individuals and as recognized by the law; and

- (ii) "Spouse" means an individual married to the petitioner at the time the petitioner was found guilty of the offense regarding which a petition is filed and who has since then been continuously married to the petitioner until the petitioner's death.
- (b) A claim for determination of factual innocence under this part is not extinguished upon the death of the petitioner.
- (c)
 - (i) If any payments are already being made to the petitioner under this part at the time of the death of the petitioner, or if the finding of factual innocence occurs after the death of the petitioner, the payments due under Section 78B-9-405 shall be paid in accordance with Section 78B-9-405 to the petitioner's surviving spouse.
 - (ii) Payments cease upon the death of the spouse.
- (15) The spouse under Subsection (14) forfeits all rights to receive any payment under this part if the spouse is charged with a homicide established by a preponderance of the evidence that meets the elements of any felony homicide offense in Title 76, Chapter 5, Offenses Against the Individual, except automobile homicide under Section 76-5-207, applying the same principles of culpability and defenses as in Title 76, Utah Criminal Code, including Title 76, Chapter 2, Principles of Criminal Responsibility.

Amended by Chapter 153, 2024 General Session

78B-9-403 Requests for appointment of counsel -- Appeals -- Postconviction petitions.

- (1) Subsections 78B-9-109(1) and (2), regarding the appointment of pro bono counsel, apply to any request for the appointment of counsel under this part.
- (2) Subsection 78B-9-109(3), regarding effectiveness of counsel, applies to subsequent postconviction petitions and to appeals under this part.

Enacted by Chapter 358, 2008 General Session

78B-9-404 Hearing upon petition -- Procedures -- Court determination of factual innocence.

- (1)
 - (a) In any hearing conducted under this part, the Utah attorney general shall represent the state.
 - (b) The burden is upon the petitioner to establish the petitioner's factual innocence by clear and convincing evidence.
- (2) The court may consider:
 - (a) evidence that was suppressed or would be suppressed at a criminal trial; and
 - (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility.
- (3) In making its determination the court shall consider, in addition to the evidence presented at the hearing under this part, the record of the original criminal case and at any postconviction proceedings in the case.
- (4) If the court, after considering all the evidence, determines by clear and convincing evidence that the petitioner:
 - (a) is factually innocent of one or more offenses of which the petitioner was convicted, the court shall order that those convictions:
 - (i) be vacated with prejudice; and
 - (ii) be expunged from the petitioner's record; or
 - (b) did not commit one or more offenses of which the petitioner was convicted, but the court does not find by clear and convincing evidence that the petitioner did not commit any lesser

included offenses relating to those offenses, the court shall modify the original conviction and sentence of the petitioner as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

- (5)
 - (a) If the court, after considering all the evidence, does not determine by clear and convincing evidence that the petitioner is factually innocent of the offense or offenses the petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny the petition regarding the offense or offenses.
 - (b) If the court finds that the petition was brought in bad faith, it shall enter the finding on the record, and the petitioner may not file a second or successive petition under this section without first applying to and obtaining permission from the court which denied the prior petition.
- (6) At least 30 days prior to a hearing on a petition to determine factual innocence, the petitioner and the respondent shall exchange information regarding the evidence each intends to present at the hearing. This information shall include:
 - (a) a list of witnesses to be called at the hearing; and
 - (b) a summary of the testimony or other evidence to be introduced through each witness, including any expert witnesses.
- (7) Each party is entitled to a copy of any expert report to be introduced or relied upon by that expert or another expert at least 30 days prior to hearing.
- (8) The court, after considering all the evidence, may not find the petitioner to be factually innocent unless:
 - (a) the court determines by clear and convincing evidence that the petitioner did not commit one or more of the offenses of which the petitioner was convicted, as defined in Subsection 78B-9-401.5(2); and
 - (b) the determination is based upon the newly discovered material evidence described in the petition, pursuant to Section 78B-9-402, and as defined in Subsection 78B-9-401.5(3).

Amended by Chapter 220, 2012 General Session

78B-9-405 Judgment and assistance payment.

- (1) As used in this section:
 - (a) "Felony" means a criminal offense classified as a felony under Title 76, Chapter 3, Punishments, or conduct that would constitute a felony if committed in Utah.
 - (b) "Petitioner" means a United States citizen or an individual who was otherwise lawfully present in this country at the time of the incident that gave rise to the underlying conviction.
- (2)
 - (a) If a court finds a petitioner factually innocent under Part 3, Postconviction Testing of DNA, or under this part, and if the petitioner has served a period of incarceration, the court shall order that the petitioner receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah, as determined by the data most recently published by the Department of Workforce Services at the time of the petitioner's release from prison.
 - (b) The court's determination of the monetary equivalent of the average annual nonagricultural payroll wage shall be included in the order declaring that the petitioner is factually innocent.
- (3) If a court orders that a petitioner is to receive payment under Subsection (2):
 - (a) the Utah Office for Victims of Crime shall pay from the Crime Victim Reparations Fund to the petitioner within 45 days of the court order under Subsection (2) an initial sum equal to

- either 20% of the total financial assistance payment as determined under Subsection (2) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the total amount owed;
- (b) the Legislature shall appropriate as nonlapsing funds from the General Fund, and no later than the next general session following the issuance of the court order under Subsection (2):
 - (i) to the Crime Victim Reparations Fund, the amount that was paid out of the fund under Subsection (3)(a); and
 - (ii) to the State Commission on Criminal and Juvenile Justice, as a separate line item, the amount ordered by the court for payments under Subsection (2), minus the amount reimbursed to the Crime Victim Reparations Fund under Subsection (3)(b)(i); and
 - (c) the State Commission on Criminal and Juvenile Justice shall pay the amount ordered by the court under Subsection (2), minus the amount paid by the Utah Office for Victims of Crime under Subsection (3)(a), to the petitioner:
 - (i) quarterly on or before the last day of the month next succeeding each calendar quarterly period; or
 - (ii) in one lump sum payment no later than the next succeeding July 31 after the day on which the court ordered the payment.
- (4)
- (a) For a payment under Subsection (3)(c):
 - (i) the petitioner shall choose, within 90 days after the day on which the payment under Subsection (3)(a) is made, whether the payment is disbursed under Subsection (3)(c)(i) or (ii); and
 - (ii) the State Commission on Criminal and Juvenile Justice shall disburse the payment in accordance with the petitioner's choice under Subsection (4)(a)(i).
 - (b) If the petitioner fails to make a choice under Subsection (4)(a)(i) within 90 days after the day on which the payment under Subsection (3)(a) is made, the State Commission on Criminal and Juvenile Justice shall pay the amount under Subsection (3)(c) in accordance with Subsection (3)(c)(i).
 - (c)
 - (i) If a court ordered a petitioner to receive a payment under this section on or before May 5, 2021, the petitioner may request that the State Commission on Criminal and Juvenile Justice disburse the remaining balance of the payment owed to the petitioner under Subsection (3)(c) in one lump sum payment.
 - (ii) If a petitioner submits a request under Subsection (4)(c)(i), the State Commission on Criminal and Juvenile Justice shall disburse the remaining balance of the payment owed to the petitioner in one lump sum payment.
- (5) Payments under Subsection (3)(c)(i) shall:
- (a) commence no later than one year after the effective date of the appropriation for the payments;
 - (b) be made to the petitioner for the balance of the amount ordered by the court after the initial payment under Subsection (3)(a); and
 - (c) be allocated so that the entire amount due to the petitioner under this section has been paid no later than 10 years after the effective date of the appropriation made under Subsection (3)(b).
- (6)
- (a) Payments under this section shall be reduced to the extent that the period of incarceration for which the petitioner seeks payment was attributable to a separate and lawful conviction.
 - (b) Payments under this section shall:

- (i) be tolled upon the commencement of any period of incarceration due to the petitioner's subsequent conviction of a felony; and
 - (ii) resume upon the conclusion of that period of incarceration.
 - (c) The reduction of payments under Subsection (6)(a) or the tolling of payments pursuant to Subsection (6)(b) shall be determined by the same court that finds a petitioner to be factually innocent under Part 3, Postconviction Testing of DNA, or this part.
- (7)
- (a) An individual is ineligible for any payments under this part if the individual was already serving a prison sentence in another jurisdiction at the time of the conviction of the crime for which that individual has been found factually innocent in accordance with Part 3, Postconviction Testing of DNA, or this part, and that individual is to be returned to that other jurisdiction upon release for further incarceration on the prior conviction.
 - (b) Ineligibility for any payments under this Subsection (7) shall be determined by the same court that finds an individual to be factually innocent under Part 3, Postconviction Testing of DNA, or this part.
- (8) Payments under this section:
- (a) are not subject to any Utah state taxes; and
 - (b) may not be offset by any expenses incurred by the state or any political subdivision of the state, including expenses incurred to secure the petitioner's custody, or to feed, clothe, or provide medical services for the petitioner.
- (9) If a court finds a petitioner to be factually innocent under Part 3, Postconviction Testing of DNA, or this part, the court shall also:
- (a) issue an order of expungement of the petitioner's criminal record for all acts in the charging document upon which the payment under this part is based; and
 - (b) provide a letter to the petitioner explaining that the petitioner's conviction has been vacated on the grounds of factual innocence and indicating that the petitioner did not commit the crime or crimes for which the petitioner was convicted and was later found to be factually innocent under Part 3, Postconviction Testing of DNA, or this part.
- (10) A petitioner found to be factually innocent under Part 3, Postconviction Testing of DNA, or this part shall have access to the same services and programs available to Utah citizens generally as though the conviction for which the petitioner was found to be factually innocent had never occurred.
- (11)
- (a) Payments under this part constitute a full and conclusive resolution of the petitioner's claims on the specific issue of factual innocence.
 - (b) Pre-judgment interest may not be awarded in addition to the payments provided under this part.

Amended by Chapter 36, 2021 General Session