

**POSTCONVICTION DNA TESTING**

2001 GENERAL SESSION

STATE OF UTAH

**Sponsor: Lyle W. Hillyard**

**This act amends the Judicial Code to provide for postconviction DNA testing of a person, and provides for procedures, if the test is favorable, to declare the person actually innocent. The act also provides procedures if the result is unfavorable.**

This act affects sections of Utah Code Annotated 1953 as follows:

ENACTS:

**78-35a-301**, Utah Code Annotated 1953

**78-35a-302**, Utah Code Annotated 1953

**78-35a-303**, Utah Code Annotated 1953

**78-35a-304**, Utah Code Annotated 1953

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

Section 1. Section **78-35a-301** is enacted to read:

**Part 3. Postconviction Testing of DNA**

**78-35a-301. Postconviction testing of DNA -- Petition -- Sufficient allegations --**

**Notification of victim.**

(1) As used in this part, "DNA" means deoxyribonucleic acid.

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

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

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

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

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

(e) the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the person's actual innocence; and

(f) the person is aware of the consequences of filing the petition, including those specified in Sections 78-35a-302 and 78-35a-304, and that the person is waiving any statute of limitations in all jurisdictions as to any felony offense he has committed which is identified through DNA database comparison.

(3) The petition under Subsection (2) shall be in compliance with Rule 65C, Utah Rules of Civil Procedure, including providing the underlying criminal case number.

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

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

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

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

(7) (a) If the court grants the petition for testing, the DNA test shall be performed by the Utah State Crime Laboratory within the Criminal Investigations and Technical Services Division created in Section 53-10-103, unless the person establishes that the state crime laboratory has a

conflict of interest or does not have the capability to perform the necessary testing.

(b) If the court orders that the testing be conducted by any laboratory other than the state crime laboratory, the court shall require that the testing be performed under reasonable conditions designed to protect the state's interests in the integrity of the evidence, and that the testing be performed according to accepted scientific standards and procedures.

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

(9) Any victim of the crime regarding which the person petitions for DNA testing, 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 and testing, even though the hearing is a civil proceeding.

Section 2. Section **78-35a-302** is enacted to read:

**78-35a-302. Effect of petition for postconviction DNA testing -- Requests for appointment of counsel -- Appeals -- Subsequent postconviction petitions.**

(1) The filing of a petition for DNA testing constitutes the person's consent to provide samples of body fluids for use in the DNA testing.

(2) The data from any DNA samples or test results obtained as a result of the petition may be entered into law enforcement DNA databases.

(3) The filing of a petition for DNA testing constitutes the person's waiver of any statute of limitations in all jurisdictions as to any felony offense the person has committed which is identified through DNA database comparison.

(4) The person filing the petition for postconviction DNA testing bears the cost of the testing unless:

(a) the person is serving a sentence of imprisonment;

(b) the person is indigent; and

(c) the DNA test is favorable to the petitioner.

(5) (a) Subsections 78-35a-109(1) and (2), regarding the appointment of pro bono counsel,

apply to any request for the appointment of counsel under this part.

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

Section 3. Section **78-35a-303** is enacted to read:

**78-35a-303. Consequences of postconviction DNA testing when result is favorable to person -- Procedures.**

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

(b) The state may stipulate to the conviction being vacated, or may request a hearing and attempt to demonstrate through evidence and argument that, despite the DNA test results, the state possesses sufficient evidence of the person's guilt so that he is unable to demonstrate by clear and convincing evidence that he is actually innocent of one or more offenses of which he was convicted, and all the lesser included offenses related to those offenses.

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

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

(c) If the court, after considering all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result, finds by clear and convincing

evidence that the person is actually innocent of one or more offenses of which the person was convicted, but the court does not find by clear and convincing evidence that the person is actually innocent of all lesser included offenses relating to those offenses, the court shall modify the original conviction and sentence of the person as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

(d) If the court, after considering all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result, does not find by clear and convincing evidence that the person is actually innocent of the offense or offenses the person is challenging, the court shall deny the person's petition regarding the offense or offenses.

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

Section 4. Section **78-35a-304** is enacted to read:

**78-35a-304. Consequences of postconviction DNA testing when result is unfavorable to person -- Procedures.**

(1) If the result of postconviction DNA testing is not favorable to the person, the court shall deny the person's petition, and the court shall:

(a) report the unfavorable result to the Board of Pardons and Parole; and

(b) order the person to pay for the costs of the DNA testing unless the petitioner has already paid that cost.

(2) This section does not apply if the DNA test is inconclusive.