

29 **78B-9-402**, as last amended by Laws of Utah 2010, Chapter 153

30 **78B-9-404**, as last amended by Laws of Utah 2010, Chapter 153

31 **78B-9-405**, as last amended by Laws of Utah 2011, Chapter 131

32

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

34 Section 1. Section **78B-9-402** is amended to read:

35 **78B-9-402. Petition for determination of factual innocence -- Sufficient**
36 **allegations -- Notification of victim.**

37 (1) A person who has been convicted of a felony offense may petition the district court
38 in the county in which the person was convicted for a hearing to establish that the person is
39 factually innocent of the crime or crimes of which the person was convicted.

40 (2) (a) The petition shall contain an assertion of factual innocence under oath by the
41 petitioner, and shall aver, with supporting affidavits or other credible documents, that:

42 (i) newly discovered material evidence exists that, if credible, establishes that the
43 petitioner is factually innocent;

44 (ii) the specific evidence identified by the petitioner in the petition establishes
45 innocence;

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

47 (iv) the material evidence is not merely impeachment evidence; and

48 (v) viewed with all the other evidence, the newly discovered evidence demonstrates
49 that the petitioner is factually innocent.

50 (b) The court shall review the petition in accordance with the procedures in Subsection
51 (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a).
52 If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall
53 dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the
54 attorney general.

55 (3) (a) The petition shall also contain an averment that:

56 (i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of

57 trial or sentencing or in time to include the evidence in any previously filed post-trial motion or
58 postconviction motion, and the evidence could not have been discovered by the petitioner or
59 the petitioner's counsel through the exercise of reasonable diligence; or

60 (ii) a court has found ineffective assistance of counsel for failing to exercise reasonable
61 diligence in uncovering the evidence.

62 (b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the
63 court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the
64 court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss
65 the petition without prejudice and give notice to the petitioner and the attorney general of the
66 dismissal, or the court may ~~[enter a finding that based upon the strength of the petition, the~~
67 ~~requirements of Subsection (3)(a) are waived in the interest of justice.]~~ waive the requirements
68 of Subsection (3)(a) if the court finds the petition should proceed to hearing based upon the
69 strength of the petition, and that there is other evidence that could have been discovered
70 through the exercise of reasonable diligence by petitioner or petitioner's counsel at trial, and the
71 other evidence:

72 (i) was not discovered by petitioner or petitioner's counsel;

73 (ii) is material upon the issue of factual innocence; and

74 (iii) has never been presented to a court.

75 (4) If the conviction for which the petitioner asserts factual innocence was based upon
76 a plea of guilty, the petition shall contain the specific nature and content of the evidence that
77 establishes factual innocence. The court shall review the evidence and may dismiss the petition
78 at any time in the course of the proceedings, if the court finds that the evidence of factual
79 innocence relies solely upon the recantation of testimony or prior statements made by a witness
80 against the petitioner, and the recantation appears to the court to be equivocal or self-serving.

81 (5) A person who has already obtained postconviction relief that vacated or reversed
82 the person's conviction or sentence may also file a petition under this part in the same manner
83 and form as described above, if no retrial or appeal regarding this offense is pending.

84 (6) If some or all of the evidence alleged to be exonerating is biological evidence

85 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

86 (7) Except as provided in Subsection (9), the petition and all subsequent proceedings
87 shall be in compliance with and governed by Rule 65C, Utah Rules of Civil Procedure, and
88 shall include the underlying criminal case number.

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

92 (9) (a) A person who files a petition under this section shall serve notice of the petition
93 and a copy of the petition upon the office of the prosecutor who obtained the conviction and
94 upon the Utah attorney general.

95 (b) The assigned judge shall conduct an initial review of the petition. If it is apparent
96 to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in
97 previous proceedings or presenting issues that appear frivolous or speculative on their face, the
98 court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal
99 upon the petitioner and the attorney general. If, upon completion of the initial review, the court
100 does not dismiss the petition, it shall order the attorney general to file a response to the petition.
101 The attorney general shall, within 30 days after receipt of the court's order, or within any
102 additional period of time the court allows, answer or otherwise respond to all proceedings
103 initiated under this part.

104 (c) After the time for response by the attorney general under Subsection (9)(b) has
105 passed, the court shall order a hearing if it finds the petition meets the requirements of
106 Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual innocence
107 regarding the charges of which the petitioner was convicted. No bona fide and compelling
108 issue of factual innocence exists if the petitioner is merely relitigating facts, issues, or evidence
109 presented in a previous proceeding or if the petitioner is unable to identify with sufficient
110 specificity the nature and reliability of the newly discovered evidence that establishes the
111 petitioner's factual innocence.

112 (d) If the parties stipulate that the evidence establishes that the petitioner is factually

113 innocent, the court may find the petitioner is factually innocent without holding a hearing. If
114 the state will not stipulate that the evidence establishes that the petitioner is factually innocent,
115 no determination of factual innocence may be made by the court without first holding a hearing
116 under this part.

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

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

123 (12) A petition to determine factual innocence under this part, or Part 3, Postconviction
124 Testing of DNA, shall be filed separately from any petition for postconviction relief under Part
125 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

126 (13) The procedures governing the filing and adjudication of a petition to determine
127 factual innocence apply to all petitions currently filed or pending in the district court and any
128 new petitions filed on or after [~~the effective date of this amendment~~] June 1, 2012.

129 (14) A claim for determination of factual innocence under this part is not extinguished
130 upon the death of the petitioner. The assistance payment provisions of Section 78B-9-405 may
131 not apply, and financial payments may not be made, if the finding of factual innocence occurs
132 after the death of the petitioner. In addition, any payments already being made under Section
133 78B-9-405 shall cease upon the death of the petitioner.

134 Section 2. Section **78B-9-404** is amended to read:

135 **78B-9-404. Hearing upon petition -- Procedures -- Court determination of factual**
136 **innocence.**

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

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

141 (2) The court may consider:

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

143 (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its

144 weight and credibility.

145 (3) In making its determination the court shall consider, in addition to the evidence

146 presented at the hearing under this part, the record of the original criminal case and at any

147 postconviction proceedings in the case.

148 (4) If the court, after considering all the evidence, determines by clear and convincing

149 evidence that the petitioner:

150 (a) is factually innocent of one or more offenses of which the petitioner was convicted,

151 the court shall order that those convictions:

152 (i) be vacated with prejudice; and

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

154 (b) did not commit one or more offenses of which the petitioner was convicted, but the

155 court does not find by clear and convincing evidence that the petitioner did not commit any

156 lesser included offenses relating to those offenses, the court shall modify the original

157 conviction and sentence of the petitioner as appropriate for the lesser included offense, whether

158 or not the lesser included offense was originally submitted to the trier of fact.

159 (5) (a) If the court, after considering all the evidence, does not determine by clear and

160 convincing evidence that the petitioner is factually innocent of the offense or offenses the

161 petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny

162 the petition regarding the offense or offenses.

163 (b) If the court finds that the petition was brought in bad faith, it shall enter the finding

164 on the record, and the petitioner may not file a second or successive petition under this section

165 without first applying to and obtaining permission from the court which denied the prior

166 petition.

167 (6) At least 30 days prior to a hearing on a petition to determine factual innocence, the

168 petitioner and the respondent shall exchange information regarding the evidence each intends

169 to present at the hearing. This information shall include:

170 (a) a list of witnesses to be called at the hearing; and

171 (b) a summary of the testimony or other evidence to be introduced through each
172 witness, including any expert witnesses.

173 (7) Each party is entitled to a copy of any expert report to be introduced or relied upon
174 by that expert or another expert at least 30 days prior to hearing.

175 (8) The court, after considering all the evidence, may not find the petitioner to be
176 factually innocent unless:

177 (a) the court determines by clear and convincing evidence that the petitioner did not
178 commit one or more of the offenses of which the petitioner was convicted, as defined in
179 Subsection 78B-9-401.5(2); and

180 (b) the determination is based upon the newly discovered material evidence described
181 in the petition, pursuant to Section 78B-9-402, and as defined in Subsection 78B-9-401.5(3).

182 Section 3. Section **78B-9-405** is amended to read:

183 **78B-9-405. Judgment and assistance payment.**

184 (1) (a) If a court finds a petitioner factually innocent under [~~Title 78B, Chapter 9,~~] Part
185 3, Postconviction Testing of DNA, or under this part, and if the petitioner has served a period
186 of incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall
187 receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of
188 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah,
189 as determined by the data most recently published by the Department of Workforce Services at
190 the time of the petitioner's release from prison.

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

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

195 (a) The Utah Office for Victims of Crime shall pay from the Crime Victim Reparations
196 Fund to the petitioner within 45 days of the court order under Subsection (1) an initial sum

197 equal to either 20% of the total financial assistance payment as determined under Subsection
198 (1) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the
199 total amount owed.

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

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

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

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

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

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

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

216 (iii) be allocated so that the entire amount due to the petitioner under this section has
217 been paid no later than 10 years after the effective date of the appropriation made under
218 Subsection (2)(b).

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

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

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

228 (c) The reduction of payments pursuant to Subsection (3)(a) or the tolling of payments
229 pursuant to Subsection (3)(b) shall be determined by the same court that finds a petitioner to be
230 factually innocent under [~~Title 78B, Chapter 9;~~] Part 3, Postconviction Testing of DNA, or this
231 part.

232 (4) (a) A person is ineligible for any payments under this part if the person was already
233 serving a prison sentence in another jurisdiction at the time of the conviction of the crime for
234 which that person has been found factually innocent pursuant to [~~Title 78B, Chapter 9;~~] Part 3,
235 Postconviction Testing of DNA, or this part, and that person is to be returned to that other
236 jurisdiction upon release for further incarceration on the prior conviction.

237 (b) Ineligibility for any payments pursuant to this Subsection (4) shall be determined by
238 the same court that finds a person to be factually innocent under [~~Title 78B, Chapter 9;~~] Part 3,
239 Postconviction Testing of DNA, or this part.

240 (5) Payments pursuant to this section:

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

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

245 (6) If a court finds a petitioner to be factually innocent under [~~Title 78B, Chapter 9;~~]
246 Part 3, Postconviction Testing of DNA, or this part, the court shall also:

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

249 (b) provide a letter to the petitioner explaining that the petitioner's conviction has been
250 vacated on the grounds of factual innocence and indicating that the petitioner did not commit
251 the crime or crimes for which the petitioner was convicted and was later found to be factually
252 innocent under [~~Title 78B, Chapter 9;~~] Part 3, Postconviction Testing of DNA, or this part.

253 (7) A petitioner found to be factually innocent under [~~Title 78B, Chapter 9,~~] Part 3,
254 Postconviction Testing of DNA, or this part shall have access to the same services and
255 programs available to Utah citizens generally as though the conviction for which the petitioner
256 was found to be factually innocent had never occurred.

257 (8) Payments pursuant to this part constitute a full and conclusive resolution of the
258 petitioner's claims on the specific issue of factual innocence. Pre-judgment interest may not be
259 awarded in addition to the payments provided under this part.