

**Representative Mark A. Wheatley** proposes the following substitute bill:

**FACTUAL INNOCENCE PAYMENTS AMENDMENTS**

2021 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Mark A. Wheatley**

Senate Sponsor: Luz Escamilla

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**LONG TITLE**

**General Description:**

This bill amends provisions regarding payments for individuals who are found factually innocent by a court.

**Highlighted Provisions:**

This bill:

- ▶ allows the State Commission of Criminal and Juvenile Justice to pay an individual who is found factually innocent by a court in one lump payment; and
- ▶ makes technical and conforming changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**78B-9-402**, as last amended by Laws of Utah 2013, Chapter 46

**78B-9-405**, as last amended by Laws of Utah 2012, Chapter 220

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



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

27 **78B-9-402. Petition for determination of factual innocence -- Sufficient**  
28 **allegations -- Notification of victim -- Payment to surviving spouse.**

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

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

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

36 (ii) the specific evidence identified by the petitioner in the petition establishes  
37 innocence;

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

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

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

42 (b) The court shall review the petition in accordance with the procedures in Subsection  
43 (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a).

44 If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall  
45 dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the  
46 attorney general.

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

48 (i) neither the petitioner nor the petitioner's counsel knew of the evidence at the time of  
49 trial or sentencing or in time to include the evidence in any previously filed post-trial motion or  
50 postconviction motion, and the evidence could not have been discovered by the petitioner or  
51 the petitioner's counsel through the exercise of reasonable diligence; or

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

54 (b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the  
55 court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the  
56 court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss

57 the petition without prejudice and give notice to the petitioner and the attorney general of the  
58 dismissal, or the court may waive the requirements of Subsection (3)(a) if the court finds the  
59 petition should proceed to hearing based upon the strength of the petition, and that there is  
60 other evidence that could have been discovered through the exercise of reasonable diligence by  
61 the petitioner or the petitioner's counsel at trial, and the other evidence:

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

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

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

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

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

74 (6) If some or all of the evidence alleged to be exonerating is biological evidence  
75 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section [78B-9-301](#).

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

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

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

85 (b) The assigned judge shall conduct an initial review of the petition. If it is apparent  
86 to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in  
87 previous proceedings or presenting issues that appear frivolous or speculative on their face, the

88 court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal  
89 upon the petitioner and the attorney general. If, upon completion of the initial review, the court  
90 does not dismiss the petition, it shall order the attorney general to file a response to the petition.  
91 The attorney general shall, within 30 days after receipt of the court's order, or within any  
92 additional period of time the court allows, answer or otherwise respond to all proceedings  
93 initiated under this part.

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

102 (d) If the parties stipulate that the evidence establishes that the petitioner is factually  
103 innocent, the court may find the petitioner is factually innocent without holding a hearing. If  
104 the state will not stipulate that the evidence establishes that the petitioner is factually innocent,  
105 no determination of factual innocence may be made by the court without first holding a hearing  
106 under this part.

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

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

113 (12) A petition to determine factual innocence under this part, or Part 3, Postconviction  
114 Testing of DNA, shall be filed separately from any petition for postconviction relief under Part  
115 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

116 (13) The procedures governing the filing and adjudication of a petition to determine  
117 factual innocence apply to all petitions currently filed or pending in the district court and any  
118 new petitions filed on or after June 1, 2012.

119 (14) (a) As used in this Subsection (14) and in Subsection (15):

120 (i) "Married" means the legal marital relationship established between a man and a  
121 woman and as recognized by the laws of this state; and

122 (ii) "Spouse" means a person married to the petitioner at the time the petitioner was  
123 found guilty of the offense regarding which a petition is filed and who has since then been  
124 continuously married to the petitioner until the petitioner's death.

125 (b) A claim for determination of factual innocence under this part is not extinguished  
126 upon the death of the petitioner.

127 (c) (i) If any payments are already being made to the petitioner under this part at the  
128 time of the death of the petitioner, or if the finding of factual innocence occurs after the death  
129 of the petitioner, the payments due under Section 78B-9-405 shall be paid [~~according to the~~  
130 ~~schedule under~~] in accordance with Section 78B-9-405 to the petitioner's surviving spouse.

131 (ii) Payments cease upon the death of the spouse.

132 (15) The spouse under Subsection (14) forfeits all rights to receive any payment under  
133 this part if the spouse is charged with a homicide established by a preponderance of the  
134 evidence that meets the elements of any felony homicide offense in Title 76, Chapter 5,  
135 Offenses Against the Person, except automobile homicide, applying the same principles of  
136 culpability and defenses as in Title 76, Utah Criminal Code, including Title 76, Chapter 2,  
137 Principles of Criminal Responsibility.

138 Section 2. Section 78B-9-405 is amended to read:

139 **78B-9-405. Judgment and assistance payment.**

140 (1) As used in this section:

141 (a) "Felony" means a criminal offense classified as a felony under Title 76, Chapter 3,  
142 Punishments, or conduct that would constitute a felony if committed in Utah.

143 (b) "Petitioner" means a United States citizen or an individual who was otherwise  
144 lawfully present in this country at the time of the incident that gave rise to the underlying  
145 conviction.

146 [~~(1)(a)~~] (2) (a) If a court finds a petitioner factually innocent under Part 3,  
147 Postconviction Testing of DNA, or under this part, and if the petitioner has served a period of  
148 incarceration, the court shall order that [~~as provided in Subsection (2), the petitioner shall~~] the  
149 petitioner receive for each year or portion of a year the petitioner was incarcerated, up to a

150 maximum of 15 years, the monetary equivalent of the average annual nonagricultural payroll  
151 wage in Utah, as determined by the data most recently published by the Department of  
152 Workforce Services at the time of the petitioner's release from prison.

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

156 ~~[(2) Payments pursuant to this section shall be made as follows:]~~

157 (b) The court's determination of the monetary equivalent of the average annual  
158 nonagricultural payroll wage shall be included in the order declaring that the petitioner is  
159 factually innocent.

160 (3) If a court orders that a petitioner is to receive payment under Subsection (2):

161 (a) ~~[The]~~ the Utah Office for Victims of Crime shall pay from the Crime Victim  
162 Reparations Fund to the petitioner within 45 days of the court order under Subsection ~~[(1)]~~ (2)  
163 an initial sum equal to either 20% of the total financial assistance payment as determined under  
164 Subsection ~~[(1)]~~ (2) or an amount equal to two years of incarceration, whichever is greater, but  
165 not to exceed the total amount owed[-];

166 (b) ~~[The]~~ the Legislature shall appropriate as nonlapsing funds from the General Fund,  
167 and no later than the next general session following the issuance of the court order under  
168 Subsection ~~[(1)]~~ (2):

169 (i) to the Crime Victim Reparations Fund, the amount that was paid out of the fund  
170 under Subsection ~~[(2)(a)]~~ (3)(a); and

171 (ii) to the State Commission on Criminal and Juvenile Justice, as a separate line item,  
172 the amount ordered by the court for payments under Subsection ~~[(1)]~~ (2), minus the amount  
173 reimbursed to the Crime Victim Reparations Fund under Subsection ~~[(2)(b)(i)]~~ (3)(b)(i); and

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

177 (c) the State Commission on Criminal and Juvenile Justice shall pay the amount  
178 ordered by the court under Subsection (2), minus the amount paid by the Utah Office for  
179 Victims of Crime under Subsection (3)(a), to the petitioner:

180 (i) quarterly on or before the last day of the month next succeeding each calendar

181 quarterly period; or

182 (ii) in one lump sum payment no later than the next succeeding July 31 after the day on  
183 which the court ordered the payment.

184 (4) (a) For a payment under Subsection (3)(c):

185 (i) the petitioner shall choose, within 90 days after the day on which the payment under  
186 Subsection (3)(a) is made, whether the payment is disbursed under Subsection (3)(c)(i) or (ii);  
187 and

188 (ii) the State Commission on Criminal and Juvenile Justice shall disburse the payment  
189 in accordance with the petitioner's choice under Subsection (4)(a)(i).

190 (b) If the petitioner fails to make a choice under Subsection (4)(a)(i) within 90 days  
191 after the day on which the payment under Subsection (3)(a) is made, the State Commission on  
192 Criminal and Juvenile Justice shall pay the amount under Subsection (3)(c) in accordance with  
193 Subsection (3)(c)(i).

194 (c) (i) If a court ordered a petitioner to receive a payment under this section on or  
195 before May 5, 2021, the petitioner may request that the State Commission on Criminal and  
196 Juvenile Justice disburse the remaining balance of the payment owed to the petitioner under  
197 Subsection (3)(c) in one lump sum payment.

198 (ii) If a petitioner submits a request under Subsection (4)(c)(i), the State Commission  
199 on Criminal and Juvenile Justice shall disburse the remaining balance of the payment owed to  
200 the petitioner in one lump sum payment.

201 ~~[(d)]~~ (5) Payments under Subsection ~~[(2)(e)]~~ (3)(c)(i) shall:

202 ~~[(i)]~~ (a) commence no later than one year after the effective date of the appropriation  
203 for the payments;

204 ~~[(ii)]~~ (b) be made to the petitioner for the balance of the amount ordered by the court  
205 after the initial payment under Subsection ~~[(2)(a)]~~ (3)(a); and

206 ~~[(iii)]~~ (c) be allocated so that the entire amount due to the petitioner under this section  
207 has been paid no later than 10 years after the effective date of the appropriation made under  
208 Subsection ~~[(2)(b)]~~ (3)(b).

209 ~~[(3)]~~ (6) (a) Payments ~~[pursuant to]~~ under this section shall be reduced to the extent  
210 that the period of incarceration for which the petitioner seeks payment was attributable to a  
211 separate and lawful conviction.

212 (b) ~~[(i)]~~ Payments ~~[pursuant to this section shall]~~ under this section shall:

213 (i) be tolled upon the commencement of any period of incarceration due to the

214 petitioner's subsequent conviction of a felony ~~[and shall]; and~~

215 (ii) resume upon the conclusion of that period of incarceration.

216 ~~[(ii) As used in this section, "felony" means a criminal offense classified as a felony~~

217 ~~under Title 76, Chapter 3, Punishments, or conduct that would constitute a felony if committed~~

218 ~~in Utah.]~~

219 (c) The reduction of payments ~~[pursuant to]~~ under Subsection ~~[(3)]~~ (6)(a) or the tolling

220 of payments pursuant to Subsection ~~[(3)]~~ (6)(b) shall be determined by the same court that

221 finds a petitioner to be factually innocent under Part 3, Postconviction Testing of DNA, or this

222 part.

223 ~~[(4)]~~ (7) (a) ~~[A person]~~ An individual is ineligible for any payments under this part if

224 the ~~[person]~~ individual was already serving a prison sentence in another jurisdiction at the time

225 of the conviction of the crime for which that ~~[person]~~ individual has been found factually

226 innocent ~~[pursuant to]~~ in accordance with Part 3, Postconviction Testing of DNA, or this part,

227 and that ~~[person]~~ individual is to be returned to that other jurisdiction upon release for further

228 incarceration on the prior conviction.

229 (b) Ineligibility for any payments ~~[pursuant to this Subsection (4)]~~ under this

230 Subsection (7) shall be determined by the same court that finds ~~[a person]~~ an individual to be

231 factually innocent under Part 3, Postconviction Testing of DNA, or this part.

232 ~~[(5)]~~ (8) Payments ~~[pursuant to]~~ under this section:

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

234 (b) may not be offset by any expenses incurred by the state or any political subdivision

235 of the state, including expenses incurred to secure the petitioner's custody, or to feed, clothe, or

236 provide medical services for the petitioner.

237 ~~[(6)]~~ (9) If a court finds a petitioner to be factually innocent under Part 3,

238 Postconviction Testing of DNA, or this part, the court shall also:

239 (a) issue an order of expungement of the petitioner's criminal record for all acts in the

240 charging document upon which the payment under this part is based; and

241 (b) provide a letter to the petitioner explaining that the petitioner's conviction has been

242 vacated on the grounds of factual innocence and indicating that the petitioner did not commit



243 the crime or crimes for which the petitioner was convicted and was later found to be factually  
244 innocent under Part 3, Postconviction Testing of DNA, or this part.

245 ~~[(7)]~~ (10) A petitioner found to be factually innocent under Part 3, Postconviction  
246 Testing of DNA, or this part shall have access to the same services and programs available to  
247 Utah citizens generally as though the conviction for which the petitioner was found to be  
248 factually innocent had never occurred.

249 ~~[(8)]~~ (11) (a) Payments ~~[pursuant to]~~ under this part constitute a full and conclusive  
250 resolution of the petitioner's claims on the specific issue of factual innocence.

251 (b) Pre-judgment interest may not be awarded in addition to the payments provided  
252 under this part.