

Representative Brian S. King proposes the following substitute bill:

FORENSIC BIOLOGICAL EVIDENCE PRESERVATION

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian S. King

Senate Sponsor: Curtis S. Bramble

LONG TITLE

General Description:

This bill concerns the preservation of biological evidence obtained in connection with the investigation or prosecution of a violent felony offense.

Highlighted Provisions:

This bill:

- ▶ creates definitions;
- ▶ amends asset forfeiture provisions to integrate biological evidence retention requirements;
- ▶ requires the preservation of biological evidence obtained in connection with the investigation or prosecution of a violent felony offense for specific time periods;
- ▶ provides procedures for the destruction of certain types of biological evidence;
- ▶ establishes procedures and remedies for preservation noncompliance; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



26 AMENDS:

- 27 **24-2-104**, as enacted by Laws of Utah 2021, Chapter 230
- 28 **24-2-106**, as renumbered and amended by Laws of Utah 2021, Chapter 230
- 29 **24-2-107**, as enacted by Laws of Utah 2021, Chapter 230
- 30 **24-2-108**, as enacted by Laws of Utah 2021, Chapter 230
- 31 **24-3-101.5**, as enacted by Laws of Utah 2021, Chapter 230
- 32 **24-4-103.3**, as enacted by Laws of Utah 2021, Chapter 230
- 33 **24-4-103.5**, as enacted by Laws of Utah 2021, Chapter 230
- 34 **78B-9-104**, as last amended by Laws of Utah 2021, Chapter 46
- 35 **78B-9-105**, as last amended by Laws of Utah 2017, Chapter 447
- 36 **78B-9-107**, as last amended by Laws of Utah 2021, Chapter 46
- 37 **78B-9-108**, as last amended by Laws of Utah 2021, Second Special Session, Chapter 4
- 38 **78B-9-202**, as last amended by Laws of Utah 2011, Chapter 165

39 ENACTS:

- 40 **53-20-101**, Utah Code Annotated 1953
- 41 **53-20-102**, Utah Code Annotated 1953
- 42 **53-20-103**, Utah Code Annotated 1953
- 43 **53-20-104**, Utah Code Annotated 1953



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

46 Section 1. Section **24-2-104** is amended to read:

47 **24-2-104. Custody of seized property and contraband.**

48 (1) If a peace officer seizes property or contraband under Section **24-2-102**, the
49 property and contraband:

50 (a) is not recoverable by replevin; and

51 (b) is considered in the custody of the agency that employed the peace officer.

52 (2) An agency with custody of seized property shall:

53 (a) hold the property in safe custody until the property is released or disposed of in
54 accordance with;

55 (i) this title; and

56 (ii) Title 53, Chapter 20, Forensic Biological Evidence Preservation; and

57 (b) maintain a record of the property, including:

58 (i) a detailed inventory of all property seized;

59 (ii) the name of the person from whom the property was seized; and

60 (iii) the agency's case number.

61 (3) [~~Art~~] In accordance with Title 53, Chapter 20, Forensic Biological Evidence

62 Preservation, an agency may process property or contraband that is seized by a peace officer for
63 evidentiary or investigative purposes, including sampling or other preservation procedure,
64 before disposal or destruction.

65 (4) (a) Except as provided in Subsection (4)(b), no later than 30 days after the day on
66 which a peace officer seizes property in the form of cash or other readily negotiable
67 instruments under Section 24-2-102, an agency shall deposit the property into a separate,
68 restricted, interest-bearing account maintained by the agency solely for the purpose of
69 managing and protecting the property from commingling, loss, or devaluation.

70 (b) A prosecuting attorney may authorize one or more written extensions of the 30-day
71 period under Subsection (4)(a) if the property needs to maintain the form in which the property
72 was seized for evidentiary purposes or other good cause.

73 (c) An agency shall:

74 (i) have written policies for the identification, tracking, management, and safekeeping
75 of seized property; and

76 (ii) shall have a written policy that prohibits the transfer, sale, or auction of seized
77 property to an employee of the agency.

78 Section 2. Section 24-2-106 is amended to read:

79 **24-2-106. Retention of property.**

80 (1) If seized property is admitted into evidence during a court proceeding, the clerk of
81 the court shall:

82 (a) retain the property; or

83 (b) return the property to the custody of the agency.

84 (2) [~~The~~] Subject to Title 53, Chapter 20, Forensic Biological Evidence Preservation,

85 the agency shall retain seized or forfeited property:

86 (a) at the discretion of the prosecuting attorney; or

87 (b) until all direct appeals and retrials are final.

88 (3) If the prosecuting attorney decides to retain control over the seized or forfeited
89 property under Subsection (2)(a) in anticipation of possible collateral attacks upon the
90 judgment or for use in a potential prosecution, the prosecuting attorney may decline to
91 authorize the disposal of the property.

92 Section 3. Section **24-2-107** is amended to read:

93 **24-2-107. Release of seized property to a claimant -- Release by surety bond or**
94 **cash - Release for hardship.**

95 (1) (a) ~~Am~~ Subject to Title 53, Chapter 20, Forensic Biological Evidence
96 Preservation, an agency with custody of seized property or the prosecuting attorney may release
97 the property to a claimant if the agency or the prosecuting attorney:

98 (i) determines that retention of the property is unnecessary; or

99 (ii) seeks to return the property to the claimant because the agency or prosecuting
100 attorney determines that the claimant is an innocent owner.

101 (b) An agency with custody of the seized property, or the prosecuting attorney, shall
102 release the property to a claimant if:

103 (i) the claimant posts a surety bond or cash with the court in accordance with
104 Subsection (2);

105 (ii) the court orders the release of property for hardship purposes under Subsection (3);

106 (iii) a claimant establishes that the claimant is an innocent owner under Section
107 **24-2-107**; or

108 (iv) the court orders property retained as evidence to be released to a rightful owner
109 under Section **24-3-104**.

110 (2) (a) Except as provided in Subsection (2)(b), a claimant may obtain release of seized
111 property by posting a surety bond or cash with the court that is in an amount equal to the
112 current fair market value of the property as determined by the court or a stipulation by the
113 parties.

114 (b) A court may refuse to order the release under Subsection (2)(a) of:

115 (i) the property if:

116 (A) the bond tendered is inadequate;

117 (B) the property is retained as evidence or is subject to retention under Title 53,
118 Chapter 20, Forensic Biological Evidence Preservation; or

119 (C) the property is particularly altered or designed for use in the commission of the
120 offense subjecting the property to forfeiture; or

121 (ii) contraband.

122 (c) If a surety bond or cash is posted and the court later determines that the property is
123 forfeited, the court shall order the forfeiture of the surety bond or cash in lieu of the property.

124 (3) A claimant is entitled to the immediate release of seized property for which the
125 agency has filed a notice of intent to forfeit under Section 24-4-103 if:

126 (a) the claimant had a possessory interest in the property at the time of seizure;

127 (b) continued possession by the agency pending a forfeiture proceeding will cause
128 substantial hardship to the claimant, including:

129 (i) preventing the functioning of a legitimate business;

130 (ii) preventing any individual from working;

131 (iii) preventing any child from attending elementary or secondary school;

132 (iv) preventing or hindering an individual from receiving necessary medical care;

133 (v) preventing the care of a dependent child or adult who is elderly or disabled;

134 (vi) leaving an individual homeless; or

135 (vii) any other condition that the court determines causes a substantial hardship;

136 (c) the hardship from the continued possession of the property by the agency outweighs
137 the risk that the property will be destroyed, damaged, lost, concealed, or transferred if the
138 property is returned to the claimant during the pendency of the proceeding; and

139 (d) the determination of substantial hardship under this Subsection (3) is based upon
140 the property's use before the seizure.

141 (4) A claimant may file a motion or petition for hardship release under Subsection (3):

142 (a) in the court in which forfeiture proceedings have commenced; or

143 (b) in a district court where there is venue if a forfeiture proceeding has not yet
144 commenced.

145 (5) The motion or petition for hardship release shall be served upon the agency with
146 custody of the property within five days after the day on which the motion or petition is filed.

147 (6) The court shall:

148 (a) schedule a hearing on the motion or petition within 14 days after the day on which
149 the motion or petition is filed; and

150 (b) render a decision on a motion or petition for hardship filed under this section no
151 later than 20 days after the day of the hearing, unless this period is extended by the agreement
152 of both parties or by the court for good cause shown.

153 (7) (a) If the claimant demonstrates substantial hardship under Subsection (3), the court
154 shall order the property immediately released to the claimant pending completion of any
155 forfeiture proceeding.

156 (b) The court may place conditions on release of the property as the court finds
157 necessary and appropriate to preserve the availability of the property or the property's
158 equivalent for forfeiture.

159 (8) The hardship release under this section does not apply to:

160 (a) contraband; or

161 (b) property that is:

162 (i) subject to retention under Title 53, Chapter 20, Forensic Biological Evidence
163 Preservation; or

164 (ii) likely to be used to commit additional offenses if returned to the claimant.

165 Section 4. Section **24-2-108** is amended to read:

166 **24-2-108. Innocent owners.**

167 (1) (a) [~~A~~] Subject to Title 53, Chapter 20, Forensic Biological Evidence Preservation,

168 a claimant alleged to be an innocent owner may recover possession of seized property by:

169 (i) submitting a written request with the seizing agency before the later of:

170 (A) the commencement of a civil asset forfeiture proceeding; or

171 (B) 30 days after the day on which the property was seized; and

172 (ii) providing the seizing agency with:

173 (A) evidence that establishes proof of ownership; and

174 (B) a brief description of the date, time, and place that the claimant mislaid or

175 relinquished possession of the seized property, or any evidence that the claimant is an innocent
176 owner.

177 (b) If a seizing agency receives a claim under Subsection (1)(a), the seizing agency
178 shall issue a written response to the claimant within 30 days after the day on which the seizing
179 agency receives the claim.

180 (c) A response under Subsection (1)(b) from the seizing agency shall indicate whether

181 the claim has been granted, denied on the merits, or denied for failure to provide the
182 information required by Subsection (1)(a)(ii).

183 (d) (i) If a seizing agency denies a claim for failure to provide the information required
184 by Subsection (1)(a)(ii), the claimant has 15 days after the day on which the claim is denied to
185 submit additional information.

186 (ii) If a prosecuting attorney has not filed a civil action seeking to forfeit the property
187 and a seizing agency has denied a claim for failure to provide the information required by
188 Subsection (1)(a)(ii), the prosecuting attorney may not commence a civil action until:

189 (A) the claimant has submitted information under Subsection (1)(d)(i); or

190 (B) the deadline for the claimant to submit information under Subsection (1)(d)(i) has
191 passed.

192 (e) If a seizing agency fails to issue a written response within 30 days after the day on
193 which the seizing agency receives the response, the seizing agency shall return the property.

194 (2) If a claim under Subsection (1)(a) is granted, or the property is returned because the
195 seizing agency fails to respond within 30 days, a claimant may not receive any expenses, costs,
196 or attorney fees for the returned property.

197 (3) A claimant may collect reasonable attorney fees and court costs if:

198 (a) a claimant filed a claim under Subsection (1)(a);

199 (b) the seizing agency denies the claim on the merits; and

200 (c) a court determines that the claimant is an innocent owner in a civil asset forfeiture
201 proceeding.

202 (4) If a court grants reasonable attorney fees and court costs, the amount of the attorney
203 fees begins to accrue from the day on which the seizing agency denied the claim.

204 (5) If the court grants reasonable attorney fees and court costs under Subsection (3), the
205 attorney fees and court costs are not subject to the 50% cap under Subsection [24-4-110\(2\)](#).

206 (6) A communication between parties regarding a claim submitted under Subsection
207 (3) and any evidence provided to the parties in connection with a claim is subject to the Utah
208 Rules of Evidence, Rules 408 and 410.

209 (7) An agency and the prosecuting attorney may not forfeit the seized property of an
210 innocent owner.

211 Section 5. Section **24-3-101.5** is amended to read:

212 **24-3-101.5. Application of this chapter.**

213 The provisions of this chapter do not apply to property:

214 (1) that is subject to the retention requirements under Title 53, Chapter 20, Forensic
215 Biological Evidence Preservation; or

216 (2) for which an agency has filed a notice of intent to seek forfeiture under Section
217 23-4-103.

218 Section 6. Section **24-4-103.3** is amended to read:

219 **24-4-103.3. Sale of seized property.**

220 (1) (a) Subject to Subsection (2) and Title 53, Chapter 20, Forensic Biological
221 Evidence Preservation, the court may order seized property, for which a forfeiture proceeding
222 is pending, to:

223 (i) be sold, leased, rented, or operated to satisfy a specified interest of any claimant; or

224 (ii) preserve the interests of any party on motion of that party.

225 (b) The court may enter an order under Subsection (1)(a) after:

226 (i) written notice to any person known to have an interest in the property has been
227 given; and

228 (ii) an opportunity for a hearing for any person known to have an interest in the
229 property has occurred.

230 (2) (a) A court may order a sale of property under Subsection (1) when:

231 (i) the property is liable to perish, waste, or be significantly reduced in value; or

232 (ii) the expenses of maintaining the property are disproportionate to the property's
233 value.

234 (b) A third party designated by the court shall:

235 (i) dispose of the property by a commercially reasonable public sale; and

236 (ii) distribute the proceeds in the following order of priority:

237 (A) first, for the payment of reasonable expenses incurred in connection with the sale;

238 (B) second, for the satisfaction of an interest, including an interest of an interest holder,

239 in the order of an interest holder's priority as determined by Title 70A, Uniform Commercial
240 Code; and

241 (C) third, any balance of the proceeds shall be preserved in the actual or constructive
242 custody of the court, in an interest-bearing account, subject to further proceedings under this

243 chapter.

244 Section 7. Section **24-4-103.5** is amended to read:

245 **24-4-103.5. Mandatory return of seized property.**

246 (1) [~~Am~~] Subject to Title 53, Chapter 20, Forensic Biological Evidence Preservation, an
247 agency shall promptly return property seized under this title, and the prosecuting attorney may
248 take no further action to forfeit the property, unless within 75 days after the day on which the
249 property is seized:

250 (a) the prosecuting attorney:

251 (i) files a criminal indictment or information under Subsection **24-4-105(3)**;

252 (ii) files a petition to transfer the property to another agency in accordance with Section
253 **24-2-105**; or

254 (iii) files a civil forfeiture complaint under Section **24-4-104**; or

255 (b) the prosecuting attorney or a federal prosecutor obtains a restraining order under
256 Subsection **24-4-105(4)**.

257 (2) (a) The prosecuting attorney may file a petition to extend the deadline under
258 Subsection (1) by 21 days.

259 (b) If a prosecuting attorney files a petition under Subsection (2)(a), and the
260 prosecuting attorney provides good cause for extending the deadline, a court shall grant the
261 petition.

262 (c) The prosecuting attorney may not file more than one petition under this Subsection
263 (2).

264 (3) If a prosecuting attorney is unable to file a civil forfeiture complaint under
265 Subsection (1)(a)(iii) because a claimant has filed a claim under Section **24-2-108** and the
266 claimant has an extension to provide additional information on the claim under Subsection
267 **24-2-108(1)(d)**, the deadline under Subsection (1) may be extended by 15 days.

268 Section 8. Section **53-20-101** is enacted to read:

269 **CHAPTER 20. FORENSIC BIOLOGICAL EVIDENCE PRESERVATION**

270 **53-20-101. Definitions.**

271 As used in this chapter:

272 (1) (a) "Biological evidence" means an item that contains blood, semen, hair, saliva,
273 epithelial cells, latent fingerprint evidence that may contain biological material suitable for

274 DNA testing, or other identifiable human biological material that:

275 (i) is collected as part of an investigation or prosecution of a violent felony offense;

276 and

277 (ii) may reasonably be used to incriminate or exculpate a person for the violent felony
278 offense.

279 (b) "Biological evidence" includes:

280 (i) material that is catalogued separately, including:

281 (A) on a slide or swab; or

282 (B) inside a test tube, if the evidentiary sample that previously was inside the test tube
283 has been consumed by testing;

284 (ii) material that is present on other evidence, including clothing, a ligature, bedding, a
285 drinking cup, a cigarette, ~~Ŝ~~→ [~~a vehicle,~~] ←~~Ŝ~~ or a weapon, from which a DNA profile may be
285a obtained;

286 (iii) the contents of a sexual assault examination kit; and

287 (iv) material described in this Subsection (1) that is in the custody of an evidence
288 collecting or retaining entity on May 4, 2022.

289 (2) "Continuous chain of custody" means:

290 (a) for a law enforcement agency or a court, that legal standards regarding a continuous
291 chain of custody are maintained; and

292 (b) for an entity that is not a law enforcement agency or a court, that the entity
293 maintains a record in accordance with legal standards required of the entity.

294 (3) "Court" means a municipal, county, or state court.

295 (4) "DNA" means deoxyribonucleic acid.

296 (5) "DNA profile" means a unique identifier of an individual derived from DNA.

297 (6) (a) "Evidence collecting or retaining entity" means an entity within the state that
298 collects, stores, or retrieves biological evidence.

299 (b) "Evidence collecting or retaining entity" includes:

300 (i) a medical or forensic entity;

301 (ii) a law enforcement agency;

302 (iii) a court; and

303 (iv) an official, employee, or agent of an entity or agency described in this Subsection

304 (6).

- 305 (7) "In custody" means an individual who:
306 (a) is incarcerated, civilly committed, on parole, or on probation; or
307 (b) is required to register under Title 77, Chapter 41, Sex and Kidnap Offender
308 Registry.
309 (8) "Law enforcement agency" means:
310 (a) a municipal, county, state institution of higher education, or state police force or
311 department;
312 (b) a sheriff's office; or
313 (c) a municipal, county, or state prosecuting authority.
314 (9) "Medical or forensic entity" means a private or public hospital, medical facility, or
315 other entity that secures biological evidence or conducts forensic examinations related to
316 criminal investigations.
317 (10) "Physical evidence" includes evidence that:
318 (a) is related to:
319 (i) an investigation;
320 (ii) an arrest; or
321 (iii) a prosecution that resulted in a judgment of conviction; and
322 (b) is in the actual or constructive possession of a law enforcement agency or a court or
323 an agent of a law enforcement agency or a court.
324 (11) "Violent felony" means the same as that term is defined in Section [76-3-203.5](#).
325 Section 9. Section **53-20-102** is enacted to read:
326 **53-20-102. Preservation of evidence -- Procedures -- Inventory request.**
327 (1) Except as provided in Section [53-20-103](#), an evidence collecting or retaining entity
328 shall preserve biological evidence:
329 (a) for the longer of:
330 (i) the length of the statute of limitations for the violent felony offense if:
331 (A) no charges are filed for the violent felony offense; or
332 (B) the violent felony offense remains unsolved;
333 (ii) the length of time that the individual convicted of the violent felony offense or any
334 lesser included violent offense remains in custody; or
335 (iii) the length of time that a co-defendant remains in custody;

336 (b) in an amount and manner sufficient to:
337 (i) develop a DNA profile; and
338 (ii) if practicable, allow for independent testing of the biological evidence by a
339 defendant; and
340 (c) subject to a continuous chain of custody.
341 (2) (a) Upon request by a defendant under Title 63G, Chapter 2, Government Records
342 Access and Management Act, the evidence collecting or retaining entity shall prepare an
343 inventory of the biological evidence preserved in connection with the defendant's criminal case.
344 (b) If the evidence collecting or retaining entity cannot locate biological evidence
345 requested under Subsection (2)(a), the custodian for the entity shall provide a sworn affidavit to
346 the defendant that:
347 (i) describes the efforts taken to locate the biological evidence; and
348 (ii) affirms that the biological evidence could not be located.
349 (3) The evidence collecting or retaining entity may dispose of biological evidence
350 before the day on which the period described in Subsection (1)(a) expires if:
351 (a) no other provision of federal or state law requires the evidence collecting or
352 retaining entity to preserve the biological evidence;
353 (b) the evidence collecting or retaining entity sends notice in accordance with
354 Subsection (4); and
355 (c) an individual notified under Subsection (4)(a) does not within 180 days after the
356 day on which the evidence collecting or retaining entity receives proof of delivery under
357 Subsection (4):
358 (i) file a motion for testing of the biological evidence under Section [78B-9-301](#); or
359 (ii) submit a written request under Subsection (4)(b)(ii).
360 (4) If the evidence collecting or retaining entity intends to dispose of the biological
361 evidence before the day on which the period described in Subsection (1)(a) expires, the
362 evidence collecting or retaining entity shall send a notice of intent to dispose of the biological
363 evidence that:
364 (a) is sent by certified mail, return receipt requested, or a delivery service that provides
365 proof of delivery, to:
366 (i) an individual who remains in custody based on a criminal conviction related to the

367 biological evidence;

368 (ii) the private attorney or public defender of record for each individual described in

369 Subsection (4)(a)(i);

370 (iii) if applicable, the prosecuting agency responsible for the prosecution of each

371 individual described in Subsection (4)(a)(i); and

372 (iv) the Utah Attorney General; and

373 (b) explains that the party receiving the notice may:

374 (i) file a motion for testing of biological evidence under Section [78B-9-301](#); or

375 (ii) submit a written request that the evidence collecting or retaining entity retain the

376 biological evidence.

377 (5) (a) Subject to Subsections (5)(b) and (c), if the evidence collecting or retaining
378 entity receives a written request to retain the biological evidence under Subsection (4)(b)(ii),
379 the evidence collecting or retaining entity shall retain the biological evidence while the
380 defendant remains in custody.

381 (b) Subject to Subsection (5)(c), the evidence collecting or retaining entity is not
382 required to preserve physical evidence that may contain biological evidence if the physical
383 evidence's size, bulk, or physical character renders retention impracticable.

384 (c) If the evidence collecting or retaining entity determines that retention is
385 impracticable, before returning or disposing of the physical evidence, the evidence collecting or
386 retaining entity shall:

387 (i) remove the portions of the physical evidence likely to contain biological evidence
388 related to the violent felony offense; and

389 (ii) preserve the removed biological evidence in a quantity sufficient to permit future
390 DNA testing.

391 (6) To comply with the preservation requirements described in this section, a law
392 enforcement agency or a court may:

393 (a) retain the biological evidence; or

394 (b) if a continuous chain of custody can be maintained, return the biological evidence
395 to the custody of the other law enforcement agency that originally provided the biological
396 evidence to the law enforcement agency.

397 Section 10. Section **53-20-103** is enacted to read:

398 **53-20-103. Exceptions.**399 (1) As used in this section, "offense concerning driving under the influence" means:400 (a) Section 41-6a-502;401 (b) Section 41-6a-502.5;402 (c) Section 41-6a-517;403 (d) Section 41-6a-530;404 (e) Subsection 58-37-8(2)(g);405 (f) Section 76-5-207; and406 (g) a local ordinance similar to the offenses described in this Subsection (1).407 (2) Section 53-20-102 does not apply to biological evidence obtained during an
408 investigation or prosecution for an offense concerning driving under the influence solely for
409 toxicology purposes.410 Section 11. Section **53-20-104** is enacted to read:411 **53-20-104. Remedies for failure to preserve evidence.**412 (1) (a) Except as provided in Subsection (1)(b) and (2), if a court finds that biological
413 evidence that reasonably could have been found to be exculpatory in a defendant's criminal
414 case was not preserved in accordance with this chapter, the court may impose sanctions and
415 remedies at the court's discretion, including:416 (i) the grant of a new trial;417 (ii) an instruction to the jury that evidence was not preserved as required by law;418 (iii) the reduction of the sentence;419 (iv) the dismissal of the criminal charge;420 (v) the vacation of the conviction; or421 (vi) the entry of a finding that because the evidence was not preserved in accordance
422 with this chapter, a presumption exists that the evidence would have been exculpatory to the
423 defendant.424 (b) The provisions in Subsection (1)(a) apply only if:425 (i) a defendant's appeal has not concluded;426 (ii) a defendant's time for appeal has not expired; or427 (iii) a defendant has received a new trial in accordance with Subsection (2)(b).428 (2) (a) A defendant shall seek relief under Title 78B, Chapter 9, Postconviction

429 Remedies Act, if:

430 (i) the defendant alleges that the biological evidence that is the basis for the defendant's
431 claim was not preserved in accordance with this chapter; and

432 (ii) (A) the defendant's appeal has concluded; or

433 (B) the time for the defendant's appeal has expired.

434 (b) If a defendant obtains relief under Title 78B, Chapter 9, Postconviction Remedies
435 Act, the provisions in Subsection (1) apply to the defendant's new trial.

436 Section 12. Section **78B-9-104** is amended to read:

437 **78B-9-104. Grounds for relief -- Retroactivity of rule.**

438 (1) Unless precluded by Section **78B-9-106** or **78B-9-107**, an individual who has been
439 convicted and sentenced for a criminal offense may file an action in the district court of
440 original jurisdiction for postconviction relief to vacate or modify the conviction or sentence
441 upon the following grounds:

442 (a) the conviction was obtained or the sentence was imposed in violation of the United
443 States Constitution or Utah Constitution;

444 (b) the conviction was obtained or the sentence was imposed under a statute that is in
445 violation of the United States Constitution or Utah Constitution, or the conduct for which the
446 petitioner was prosecuted is constitutionally protected;

447 (c) the sentence was imposed or probation was revoked in violation of the controlling
448 statutory provisions;

449 (d) the petitioner had ineffective assistance of counsel in violation of the United States
450 Constitution or Utah Constitution;

451 (e) newly discovered material evidence exists that requires the court to vacate the
452 conviction or sentence, because:

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

457 (ii) the material evidence is not merely cumulative of evidence that was known;

458 (iii) the material evidence is not merely impeachment evidence; and

459 (iv) viewed with all the other evidence, the newly discovered material evidence

460 demonstrates that no reasonable trier of fact could have found the petitioner guilty of the
461 offense or subject to the sentence received;

462 (f) the petitioner can prove that:

463 (i) biological evidence, as that term is defined in Section 53-20-101, relevant to the
464 petitioner's conviction was not preserved in accordance with Title 53, Chapter 20, Forensic
465 Biological Evidence Preservation;

466 (ii) (A) the biological evidence described in Subsection (1)(f)(i) was not tested
467 previously; or

468 (B) if the biological evidence described in Subsection (1)(f)(i) was tested previously,
469 there is a material change in circumstance, including a scientific or technological advance, that
470 would make it plausible that a test of the biological evidence described in Subsection (1)(f)(i)
471 would produce a favorable test result for the petitioner; and

472 (iii) a favorable result described in Subsection (1)(f)(ii), which is presumed for
473 purposes of the petitioner's action under this section, when viewed with all the other evidence,
474 demonstrates a reasonable probability of a more favorable outcome at trial for the petitioner;

475 ~~[(f)]~~ (g) the petitioner can prove entitlement to relief under a rule announced by the
476 United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after
477 conviction and sentence became final on direct appeal, and that:

478 (i) the rule was dictated by precedent existing at the time the petitioner's conviction or
479 sentence became final; or

480 (ii) the rule decriminalizes the conduct that comprises the elements of the crime for
481 which the petitioner was convicted; or

482 ~~[(g)]~~ (h) the petitioner committed any of the following offenses while subject to force,
483 fraud, or coercion, as defined in Section 76-5-308:

484 (i) Section 58-37-8, possession of a controlled substance;

485 (ii) Section 76-10-1304, aiding prostitution;

486 (iii) Section 76-6-206, criminal trespass;

487 (iv) Section 76-6-413, theft;

488 (v) Section 76-6-502, possession of forged writing or device for writing;

489 (vi) Sections 76-6-602 through 76-6-608, retail theft;

490 (vii) Subsection 76-6-1105(2)(a)(i)(A), unlawful possession of another's identification

491 document;

492 (viii) Section 76-9-702, lewdness;

493 (ix) Section 76-10-1302, prostitution; or

494 (x) Section 76-10-1313, sexual solicitation.

495 (2) The court may not grant relief from a conviction or sentence unless in light of the
496 facts proved in the postconviction proceeding, viewed with the evidence and facts introduced at
497 trial or during sentencing:

498 (a) the petitioner establishes that there would be a reasonable likelihood of a more
499 favorable outcome; or

500 (b) if the petitioner challenges the conviction or the sentence on grounds that the
501 prosecutor knowingly failed to correct false testimony at trial or at sentencing, the petitioner
502 establishes that the false testimony, in any reasonable likelihood, could have affected the
503 judgment of the fact finder.

504 (3) (a) The court may not grant relief from a conviction based on a claim that the
505 petitioner is innocent of the crime for which convicted except as provided in Part 3,
506 Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.

507 (b) Claims under Part 3, Postconviction Testing of DNA, or Part 4, Postconviction
508 Determination of Factual Innocence, of this chapter may not be filed as part of a petition under
509 this part, but shall be filed separately and in conformity with the provisions of Part 3,
510 Postconviction Testing of DNA, or Part 4, Postconviction Determination of Factual Innocence.

511 Section 13. Section 78B-9-105 is amended to read:

512 **78B-9-105. Burden of proof.**

513 (1) (a) Except for claims raised under Subsection 78B-9-104(1)(~~g~~)(h), the petitioner
514 has the burden of pleading and proving by a preponderance of the evidence the facts necessary
515 to entitle the petitioner to relief.

516 (b) For claims raised under Subsection 78B-9-104(1)(~~g~~)(h), the petitioner has the
517 burden of pleading and proving by clear and convincing evidence the facts necessary to entitle
518 the petitioner to relief.

519 (c) The court may not grant relief without determining that the petitioner is entitled to
520 relief under the provisions of this chapter and in light of the entire record, including the record
521 from the criminal case under review.

522 (2) The respondent has the burden of pleading any ground of preclusion under Section
523 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its
524 existence by a preponderance of the evidence.

525 Section 14. Section 78B-9-107 is amended to read:

526 **78B-9-107. Statute of limitations for postconviction relief.**

527 (1) A petitioner is entitled to relief only if the petition is filed within one year after the
528 day on which the cause of action has accrued.

529 (2) For purposes of this section, the cause of action accrues on the later of the
530 following dates:

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

533 (b) the entry of the decision of the appellate court that has jurisdiction over the case, if
534 an appeal is taken;

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

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

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

541 (f) the date on which the new rule described in Subsection 78B-9-104(1)(~~f~~)(g) is
542 established.

543 (3) (a) The limitations period is tolled for any period during which the petitioner was
544 prevented from filing a petition due to state action in violation of the United States
545 Constitution, due to physical or mental incapacity, or for claims arising under Subsection
546 78B-9-104(1)(~~g~~)(h), due to force, fraud, or coercion as defined in Section 76-5-308.

547 (b) The petitioner has the burden of proving by a preponderance of the evidence that
548 the petitioner is entitled to relief under this Subsection (3).

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

551 (a) exoneration through DNA testing under Section 78B-9-303; or

552 (b) factual innocence under Section 78B-9-402.

553 (5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period
554 established in this section.

555 (6) This section does not apply to a petition filed under Part 3, Postconviction Testing
556 of DNA, or Part 4, Postconviction Determination of Factual Innocence.

557 Section 15. Section 78B-9-108 is amended to read:

558 **78B-9-108. Effect of granting relief -- Notice.**

559 (1) If the court grants the petitioner's request for relief, except requests for relief under
560 Subsection 78B-9-104(1)(~~g~~)(h), the court shall either:

561 (a) modify the original conviction or sentence; or

562 (b) vacate the original conviction or sentence and order a new trial or sentencing
563 proceeding as appropriate.

564 (2) If the court grants the petitioner's request for relief under Subsection
565 78B-9-104(1)(~~g~~)(h), the court shall:

566 (a) vacate the original conviction and sentence; and

567 (b) order the petitioner's records expunged pursuant to Section 77-40-108.5.

568 (3) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five
569 days. Within the stay period, the respondent shall give written notice to the court and the
570 petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the
571 order, or take no action.

572 (b) If the respondent fails to provide notice or gives notice at any time during the stay
573 period that it intends to take no action, the court shall lift the stay and deliver the order to the
574 custodian of the petitioner.

575 (c) If the respondent gives notice of intent to appeal the court's decision, the stay
576 provided for by Subsection (3)(a) shall remain in effect until the appeal concludes, including
577 any petitions for rehearing or for discretionary review by a higher court. The court may lift the
578 stay if the petitioner can make the showing required for a certificate of probable cause under
579 Section 77-20-302 and Utah Rules of Criminal Procedure, Rule 27.

580 (d) If the respondent gives notice that it intends to retry or resentence the petitioner, the
581 trial court may order any supplementary orders as to arraignment, trial, sentencing, custody,
582 bail, discharge, or other matters that may be necessary.

583 Section 16. Section 78B-9-202 is amended to read:

584 **78B-9-202. Appointment and payment of counsel in death penalty cases.**

585 (1) A person who has been sentenced to death and whose conviction and sentence has
586 been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled
587 no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter
588 allowing challenges to the conviction and death sentence and the appointment of counsel for
589 indigent petitioners.

590 (2) (a) If a petitioner requests the court to appoint counsel, the court shall determine
591 whether the petitioner is indigent and make findings on the record regarding the petitioner's
592 indigency. If the court finds that the petitioner is indigent, it shall, subject to the provisions of
593 Subsection (5), promptly appoint counsel who is qualified to represent petitioners in
594 postconviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal
595 Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be
596 appointed to represent the petitioner under this section.

597 (b) A petitioner who wishes to reject the offer of counsel shall be advised on the record
598 by the court of the consequences of the rejection before the court may accept the rejection.

599 (3) Attorney fees and litigation expenses incurred in providing the representation
600 provided for in this section and that the court has determined are reasonable shall be paid from
601 state funds by the Division of Finance according to rules established pursuant to Title 63G,
602 Chapter 3, Utah Administrative Rulemaking Act.

603 (a) In determining whether the requested funds are reasonable, the court should
604 consider:

605 (i) the extent to which the petitioner requests funds to investigate and develop evidence
606 and legal arguments that duplicate the evidence presented and arguments raised in the criminal
607 proceeding; and

608 (ii) whether the petitioner has established that the requested funds are necessary to
609 develop evidence and legal arguments that are reasonably likely to support postconviction
610 relief.

611 (b) The court may authorize payment of attorney fees at a rate of \$125 per hour up to a
612 maximum of \$60,000. The court may exceed the maximum only upon a showing of good
613 cause as established in Subsections (3)(e) and (f).

614 (c) The court may authorize litigation expenses up to a maximum of \$20,000. The

615 court may exceed the maximum only upon a showing of good cause as established in
616 Subsections (3)(e) and (f).

617 (d) The court may authorize the petitioner to apply ex parte for the funds permitted in
618 Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes
619 the need for confidentiality. The motion to proceed ex parte must be served on counsel
620 representing the state, and the court may not grant the motion without giving the state an
621 opportunity to respond.

622 (e) In determining whether good cause exists to exceed the maximum sums established
623 in Subsections (3)(b) and (c), the court shall consider:

624 (i) the extent to which the work done to date and the further work identified by the
625 petitioner duplicates work and investigation performed during the criminal case under review;
626 and

627 (ii) whether the petitioner has established that the work done to date and the further
628 work identified is reasonably likely to develop evidence or legal arguments that will support
629 postconviction relief.

630 (f) The court may permit payment in excess of the maximum amounts established in
631 Subsections (3)(b) and (c) only on the petitioner's motion, provided that:

632 (i) if the court has granted a motion to file ex parte applications under Subsection
633 (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant
634 attorney general employed in a division other than the one in which the attorney is employed
635 who represents the state in the postconviction case; if the court has not granted a motion to file
636 ex parte applications, then the petitioner must serve the attorney representing the state in the
637 postconviction matter with the motion to exceed the maximum funds;

638 (ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney
639 general may not disclose to the attorney representing the state in the postconviction matter any
640 material the petitioner provides in support of the motion except upon a determination by the
641 court that the material is not protected by or that the petitioner has waived the attorney client
642 privilege or work product doctrine; and

643 (iii) the court gives the state an opportunity to respond to the request for funds in
644 excess of the maximum amounts provided in Subsections (3)(b) and (c).

645 (4) Nothing in this chapter shall be construed as creating the right to the effective

646 assistance of postconviction counsel, and relief may not be granted on any claim that
647 postconviction counsel was ineffective.

648 (5) If within 60 days of the request for counsel the court cannot find counsel willing to
649 accept the appointment, the court shall notify the petitioner and the state's counsel in writing.
650 In that event, the petitioner may elect to proceed pro se by serving written notice of that
651 election on the court and state's counsel within 30 days of the court's notice that no counsel
652 could be found. If within 30 days of its notice to the petitioner the court receives no notice that
653 the petitioner elects to proceed pro se, the court shall dismiss any pending postconviction
654 actions and vacate any execution stays, and the state may initiate proceedings under Section
655 [77-19-9](#) to issue an execution warrant.

656 (6) Subject to Subsection (2)(a) the court shall appoint counsel to represent the
657 petitioner for the first petition filed after the direct appeal. For all other petitions, counsel may
658 not be appointed at public expense for a petitioner, except to raise claims:

659 (a) based on newly discovered evidence as defined in Subsection [78B-9-104\(1\)\(e\)\(i\)](#);

660 or

661 (b) based on Subsection [78B-9-104\(1\)\(~~f~~\)\(g\)](#) that could not have been raised in any
662 previously filed post trial motion or postconviction proceeding.