

HB0065S01 compared with HB0065

~~text~~ shows text that was in HB0065 but was deleted in HB0065S01.

text shows text that was not in HB0065 but was inserted into HB0065S01.

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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: _____

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 ~~remedies~~procedures and ~~penalties~~remedies for preservation

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noncompliance; and

- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

24-2-104, as enacted by Laws of Utah 2021, Chapter 230

24-2-106, as renumbered and amended by Laws of Utah 2021, Chapter 230

24-2-107, as enacted by Laws of Utah 2021, Chapter 230

24-2-108, as enacted by Laws of Utah 2021, Chapter 230

24-3-101.5, as enacted by Laws of Utah 2021, Chapter 230

24-4-103.3, as enacted by Laws of Utah 2021, Chapter 230

24-4-103.5, as enacted by Laws of Utah 2021, Chapter 230

78B-9-104, as last amended by Laws of Utah 2021, Chapter 46

78B-9-105, as last amended by Laws of Utah 2017, Chapter 447

78B-9-107, as last amended by Laws of Utah 2021, Chapter 46

78B-9-108, as last amended by Laws of Utah 2021, Second Special Session, Chapter 4

78B-9-202, as last amended by Laws of Utah 2011, Chapter 165

ENACTS:

53-20-101, Utah Code Annotated 1953

53-20-102, Utah Code Annotated 1953

53-20-103, Utah Code Annotated 1953

53-20-104, Utah Code Annotated 1953

~~53-20-105, Utah Code Annotated 1953~~

~~53-20-106, Utah Code Annotated 1953~~

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

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

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

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

- (a) is not recoverable by replevin; and
- (b) is considered in the custody of the agency that employed the peace officer.

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

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

(i) this title; and

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

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

- (i) a detailed inventory of all property seized;
- (ii) the name of the person from whom the property was seized; and
- (iii) the agency's case number.

(3) [Am] In accordance with Title 53, Chapter 20, Forensic Biological Evidence Preservation, an agency may process property or contraband that is seized by a peace officer for evidentiary or investigative purposes, including sampling or other preservation procedure, before disposal or destruction.

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

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

(c) An agency shall:

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

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

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

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24-2-106. Retention of property.

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

- (a) retain the property; or
- (b) return the property to the custody of the agency.

(2) [The] Subject to Title 53, Chapter 20, Forensic Biological Evidence Preservation, the agency shall retain seized or forfeited property:

- (a) at the discretion of the prosecuting attorney; or
- (b) until all direct appeals and retrials are final.

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

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

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

(1) (a) [An] Subject to Title 53, Chapter 20, Forensic Biological Evidence Preservation, an agency with custody of seized property or the prosecuting attorney may release the property to a claimant if the agency or the prosecuting attorney:

- (i) determines that retention of the property is unnecessary; or
- (ii) seeks to return the property to the claimant because the agency or prosecuting attorney determines that the claimant is an innocent owner.

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

- (i) the claimant posts a surety bond or cash with the court in accordance with Subsection (2);
- (ii) the court orders the release of property for hardship purposes under Subsection (3);
- (iii) a claimant establishes that the claimant is an innocent owner under Section

24-2-107; or

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

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

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

(i) the property if:

(A) the bond tendered is inadequate;

(B) the property is retained as evidence or is subject to retention under Title 53,

Chapter 20, Forensic Biological Evidence Preservation; or

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

(ii) contraband.

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

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

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

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

(i) preventing the functioning of a legitimate business;

(ii) preventing any individual from working;

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

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

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

(vi) leaving an individual homeless; or

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

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

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

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

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

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

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

(6) The court shall:

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

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

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

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

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

(a) contraband; or

(b) property that is:

(i) subject to retention under Title 53, Chapter 20, Forensic Biological Evidence

Preservation; or

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

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

24-2-108. Innocent owners.

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

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

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

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

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

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(ii) providing the seizing agency with:

(A) evidence that establishes proof of ownership; and

(B) a brief description of the date, time, and place that the claimant mislaid or relinquished possession of the seized property, or any evidence that the claimant is an innocent owner.

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

(c) A response under Subsection (1)(b) from the seizing agency shall indicate whether the claim has been granted, denied on the merits, or denied for failure to provide the information required by Subsection (1)(a)(ii).

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

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

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

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

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

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

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

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

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

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

(4) If a court grants reasonable attorney fees and court costs, the amount of the attorney

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fees begins to accrue from the day on which the seizing agency denied the claim.

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

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

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

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

24-3-101.5. Application of this chapter.

The provisions of this chapter do not apply to property:

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

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

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

24-4-103.3. Sale of seized property.

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

- (i) be sold, leased, rented, or operated to satisfy a specified interest of any claimant; or
- (ii) preserve the interests of any party on motion of that party.

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

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

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

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

- (i) the property is liable to perish, waste, or be significantly reduced in value; or
- (ii) the expenses of maintaining the property are disproportionate to the property's

value.

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

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

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

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

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

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

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

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

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

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

(a) the prosecuting attorney:

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

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

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

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

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

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

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

(3) If a prosecuting attorney is unable to file a civil forfeiture complaint under

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Subsection (1)(a)(iii) because a claimant has filed a claim under Section 24-2-108 and the claimant has an extension to provide additional information on the claim under Subsection 24-2-108(1)(d), the deadline under Subsection (1) may be extended by 15 days.

Section ~~{+}~~8. Section **53-20-101** is enacted to read:

CHAPTER 20. FORENSIC BIOLOGICAL EVIDENCE PRESERVATION

~~{~~ **53-20-101. Title:**

~~—~~ This chapter is known as "Forensic Biological Evidence Preservation."

~~—~~ Section 2. Section **53-20-102** is enacted to read:

~~}~~ ~~{53-20-102}~~**53-20-101. Definitions.**

As used in this chapter:

(1) (a) "Biological evidence" means an item that contains blood, semen, hair, saliva, epithelial cells, ~~{a}~~ latent fingerprint evidence that may contain biological material suitable for DNA testing, or other identifiable human biological material that:

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

and

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

(b) "Biological evidence" includes:

(i) material that is catalogued separately, including:

(A) on a slide or swab; or

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

(ii) material that is present on other evidence, including clothing, a ligature, bedding, a drinking cup, a cigarette, a vehicle, or a weapon, from which a DNA profile may be obtained;

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

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

(2) "Continuous chain of custody" means:

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

(b) for an entity that is not a law enforcement agency or a court, that the entity

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maintains a record in accordance with legal standards required of the entity.

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

(~~3~~4) "DNA" means deoxyribonucleic acid.

(~~4~~5) "DNA profile" means a unique identifier of an individual derived from DNA.

(~~5~~6) (a) "Evidence collecting or retaining entity" means an entity within the state that collects, stores, or retrieves biological evidence.

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

(i) a medical or forensic entity;

(ii) a law enforcement agency;

(iii) a court; and

(~~iii~~iv) an official, employee, or agent of an entity or agency described in this

Subsection (~~5~~6).

(~~6~~7) "In custody" means an individual who:

(a) is incarcerated, civilly committed, on parole, or on probation; or

(b) is required to register under Title 77, Chapter 41, Sex and Kidnap Offender

Registry.

(~~7~~8) "Law enforcement agency" means:

(a) a municipal, county, state institution of higher education, or state police force or department;

(b) a sheriff's office; or

(c) a municipal, county, or state prosecuting authority~~;~~ or;

~~{~~ (d) a municipal, county, or state court.

~~}~~ (~~8~~9) "Medical or forensic entity" means a private or public hospital, medical facility, or other entity that secures biological evidence or conducts forensic examinations related to criminal investigations.

(~~9~~10) "Physical evidence" includes evidence that:

(a) is related to:

(i) an investigation;

(ii) an arrest; or

(iii) a prosecution that resulted in a judgment of conviction; and

(b) is in the actual or constructive possession of a law enforcement agency or a court or

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an agent of a law enforcement agency;

Section 3} or a court.

(11) "Violent felony" means the same as that term is defined in Section 76-3-203.5.

Section 9. Section ~~{53-20-103}~~53-20-102 is enacted to read:

~~{53-20-103}~~53-20-102. **Preservation of evidence -- Procedures -- Inventory**

request.

(1) Except as provided in Section ~~{53-20-104}~~53-20-103, an evidence collecting or retaining entity shall preserve biological evidence:

(a) for the longer of:

(i) the length of the statute of limitations for the violent felony offense if:

(A) no charges are filed for the violent felony offense; or

(B) the violent felony offense remains unsolved;

(ii) the length of time that the ~~{person}~~individual convicted of the violent felony offense or any lesser included violent offense remains in custody; or

(iii) the length of time that a co-defendant remains in custody;

(b) in an amount and manner sufficient to:

(i) develop a DNA profile; and

(ii) if practicable, allow for independent testing of the biological evidence by a defendant; and

(c) subject to a continuous chain of custody.

(2) (a) Upon ~~{written}~~ request by a defendant under Title 63G, Chapter 2, Government Records Access and Management Act, the evidence collecting or retaining entity shall prepare an inventory of the biological evidence preserved in connection with the defendant's criminal case.

(b) If the evidence collecting or retaining entity cannot locate biological evidence requested under Subsection (2)(a), the custodian for the entity shall provide a sworn affidavit to the defendant that:

(i) describes the efforts taken to locate the biological evidence; and

(ii) affirms that the biological evidence could not be located.

(3) The evidence collecting or retaining entity may dispose of biological evidence before the day on which the period described in Subsection (1)(a) expires if:

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(a) no other provision of federal or state law requires the evidence collecting or retaining entity to preserve the biological evidence;

(b) the evidence collecting or retaining entity sends notice in accordance with Subsection (4); and

(c) an individual notified under Subsection (4)(a) does not within 180 days after the day on which the ~~individual~~evidence collecting or retaining entity receives ~~the notice~~proof of delivery under Subsection (4):

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

(ii) submit a written request under Subsection (4)(b)(ii).

(4) If the evidence collecting or retaining entity intends to dispose of the biological evidence before the day on which the period described in Subsection (1)(a) expires, the evidence collecting or retaining entity shall send a notice of intent to dispose of the biological evidence that:

(a) is sent by certified mail, return receipt requested, or a delivery service that provides proof of delivery, to:

(i) an individual who remains in custody based on a criminal conviction related to the biological evidence;

(ii) the private attorney or public defender of record for each individual described in Subsection (4)(a)(i);

(iii) if applicable, the ~~city or county attorney for the city or county~~prosecuting agency responsible for the prosecution of each individual described in Subsection (4)(a)(i); and

(iv) the Utah Attorney General; and

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

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

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

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

(b) Subject to Subsection (5)(c), the evidence collecting or retaining entity is not

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required to preserve physical evidence that may contain biological evidence if the physical evidence's size, bulk, or physical character renders retention impracticable.

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

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

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

(6) To comply with the preservation requirements described in ~~Subsection (1)~~this section, a law enforcement agency or a court may:

(a) retain the biological evidence; or

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

Section ~~{4}~~10. Section ~~{53-20-104}~~53-20-103 is enacted to read:

~~{53-20-104}~~53-20-103. **Exceptions.**

(1) As used in this section, "offense concerning driving under the influence" means:

(a) Section 41-6a-502;

(b) Section 41-6a-502.5;

(c) Section 41-6a-517;

(d) Section 41-6a-530;

(e) Subsection 58-37-8(2)(g);

(f) Section 76-5-207; and

(g) a local ordinance similar to the offenses described in this Subsection (1).

(2) Section ~~{53-20-103}~~53-20-102 does not apply to biological evidence obtained during an investigation or prosecution for an offense concerning driving under the influence solely for toxicology purposes.

Section ~~{5}~~11. Section ~~{53-20-105}~~53-20-104 is enacted to read:

~~{~~**53-20-105. Criminal failure to preserve evidence -- Penalty -- Investigation.**

~~—~~(1) A person commits the offense of criminal failure to preserve evidence if the person

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~~intentionally or knowingly destroys, alters, conceals, or tampers with biological evidence with the intent to:~~

- ~~— (a) impair the integrity of the evidence;~~
- ~~— (b) prevent the evidence from being subjected to DNA testing or other analysis; or~~
- ~~— (c) prevent production or use of the evidence in a criminal investigation or proceeding;~~
- ~~— (2) A violation of Subsection (1) is a class A misdemeanor;~~
- ~~— (3) An investigation of a person suspected of violating Subsection (1) may not be conducted by the entity that employs the suspected person;~~

~~— Section 6. Section 53-20-106 is enacted to read:~~

‡ ~~53-20-106~~53-20-104. Remedies for failure to preserve evidence.

(1) ~~††(a)~~(a) Except as provided in Subsection (1)(b) and (2), if a court finds that biological evidence that reasonably could have been found to be exculpatory in a defendant's criminal case was not preserved in accordance with this chapter, the court may impose sanctions and remedies at the court's discretion, including:

- ~~(†a)†~~(i) the grant of a new trial;
- ~~(†b)†~~(ii) an instruction to the jury that evidence was not preserved as required by law;
- ~~(†c)†~~(iii) the reduction of the sentence;
- ~~(†d)†~~(iv) the dismissal of the criminal charge;
- ~~(†e)†~~(v) the vacation of the conviction; or
- ~~(†f)†~~(vi) the entry of a finding that because the evidence was not preserved in

accordance with this chapter, a presumption exists that the evidence would have been exculpatory to the defendant.

~~(†2)†~~(b) The ~~imposition of a remedy or sanction under~~provisions in Subsection (1)(a) apply only if:

- (i) a defendant's appeal has not concluded;
- (ii) a defendant's time for appeal has not expired; or
- (iii) a defendant has received a new trial in accordance with Subsection (2)(b).

(2) (a) A defendant shall seek relief under Title 78B, Chapter 9, Postconviction

Remedies Act, if:

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

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

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

(b) If a defendant obtains relief under Title 78B, Chapter 9, Postconviction Remedies Act, the provisions in Subsection (1) ~~{does not preclude a prosecution under}~~ apply to the defendant's new trial.

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

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

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

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

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

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

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

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

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

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

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

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received;

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(f) the petitioner can prove that:

(i) biological evidence, as that term is defined in Section ~~53-20-105~~:

~~53-20-101, relevant to the petitioner's conviction was not preserved in accordance with Title 53, Chapter 20, Forensic Biological Evidence Preservation;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

78B-9-105. Burden of proof.

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

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

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

(2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its

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existence by a preponderance of the evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) modify the original conviction or sentence; or

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

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

(a) vacate the original conviction and sentence; and

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

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

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

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

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

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

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

(1) A person who has been sentenced to death and whose conviction and sentence has

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been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent petitioners.

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

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

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

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

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

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

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

(c) The court may authorize litigation expenses up to a maximum of \$20,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).

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

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

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

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

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

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

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

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

(4) Nothing in this chapter shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective.

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

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

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

or

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