

**Senator J. Stuart Adams** proposes the following substitute bill:

**POSTCONVICTION REMEDIES ACT**

**AMENDMENTS**

2010 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: J. Stuart Adams**

House Sponsor: Rebecca D. Lockhart

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**LONG TITLE**

**General Description:**

This bill clarifies the procedure for claiming factual innocence.

**Highlighted Provisions:**

This bill:

- ▶ clarifies the procedure for claiming factual innocence;
- ▶ specifies particular steps required;
- ▶ gives the court discretion to review and dismiss petitions under specific circumstances; and
- ▶ makes technical corrections.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

This bill provides an immediate effective date.

**Utah Code Sections Affected:**

AMENDS:

**78B-9-104**, as last amended by Laws of Utah 2008, Chapter 288 and renumbered and amended by Laws of Utah 2008, Chapter 3



26           **78B-9-402**, as last amended by Laws of Utah 2009, Chapter 301

27           **78B-9-404**, as enacted by Laws of Utah 2008, Chapter 358

28 ENACTS:

29           **78B-9-401.5**, Utah Code Annotated 1953

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

32           Section 1. Section **78B-9-104** is amended to read:

33           **78B-9-104. Grounds for relief -- Retroactivity of rule.**

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

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

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

43           (c) the sentence was imposed or probation was revoked in violation of the controlling  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

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

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

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

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

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

55           (iv) viewed with all the other evidence, the newly discovered material evidence  
56 demonstrates that no reasonable trier of fact could have found the petitioner guilty of the

57 offense or subject to the sentence received; or

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

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

63 (ii) the rule decriminalizes the conduct that comprises the elements of the crime for  
64 which the petitioner was convicted.

65 (2) The court may not grant relief from a conviction or sentence unless the petitioner  
66 establishes that there would be a reasonable likelihood of a more favorable outcome in light of  
67 the facts proved in the post-conviction proceeding, viewed with the evidence and facts  
68 introduced at trial or during sentencing.

69 (3) The court may not grant relief from a conviction based on a claim that the petitioner  
70 is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3,  
71 Postconviction Testing of DNA , or Part 4, Post-Conviction Determination of Factual  
72 Innocence. Claims under Part 3 or Part 4 of this chapter may not be filed as part of a petition  
73 under this part, but shall be filed separately and in conformity with the provisions of Part 3 or  
74 Part 4.

75 Section 2. Section **78B-9-401.5** is enacted to read:

76 **78B-9-401.5. Definitions.**

77 As used in this part:

78 (1) "Bona fide and compelling issue of factual innocence" means that the newly  
79 discovered material evidence presented by petitioner, if credible, would clearly establish the  
80 factual innocence of the petitioner.

81 (2) "Factual innocence" or "factually innocent" means a person did not:

82 (a) engage in the conduct for which the person was convicted;

83 (b) engage in conduct relating to any lesser included offenses of the crime for which  
84 the person was convicted; or

85 (c) commit any other felony arising out of or reasonably connected to the facts  
86 supporting the indictment or information upon which the person was convicted.

87 (3) "Newly discovered material evidence" means evidence that was not available to

88 petitioner at trial or during the resolution on the merits by the trial court of any motion to  
89 withdraw a guilty plea or motion for new trial and which is relevant to the determination of the  
90 issue of factual innocence, and may also include:

91 (a) evidence which was discovered prior to or in the course of any appeal or  
92 post-conviction proceedings that served in whole or in part as the basis for vacatur or reversal  
93 of the conviction of petitioner, or

94 (b) evidence that supports the claims within a petition filed under Part 1 of this chapter  
95 which is pending at the time of the court's determination of factual innocence.

96 (4) "Period of incarceration" means any sentence of imprisonment, including jail,  
97 which was served after judgement of conviction.

98 Section 3. Section **78B-9-402** is amended to read:

99 **78B-9-402. Petition for determination of factual innocence -- Sufficient**

100 **allegations -- Notification of victim.**

101 [~~As used in this part:~~]

102 [~~(1) "Factually innocent" means a person did not:~~]

103 [~~(a) engage in the conduct for which the person was convicted;~~]

104 [~~(b) engage in conduct relating to any lesser included offenses; or]~~

105 [~~(c) commit any other felony arising out of or reasonably connected to the facts~~  
106 ~~supporting the indictment or information upon which the person was convicted.]~~

107 [~~(2) (a) (1) A person who has been convicted of a felony offense may petition the~~  
108 ~~district court in the county in which the person was convicted for a hearing to establish that the~~  
109 ~~person is factually innocent of the crime or crimes of which the person was convicted[, if the~~  
110 ~~person asserts].~~

111 (2) (a) The petition shall contain an assertion of factual innocence under oath [and the  
112 petition alleges] by the petitioner, and shall aver, with supporting affidavits or other credible  
113 documents, that:

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

116 (ii) [~~the petitioner identifies]~~ the specific evidence identified by the petitioner [~~claims]~~  
117 in the petition establishes innocence;

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

119 (iv) the material evidence is not merely impeachment evidence; and  
120 (v) viewed with all the other evidence, the newly discovered evidence demonstrates  
121 that the petitioner is factually innocent[~~;~~~~and~~].

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

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

128 [~~(vi)-(A)~~] (i) neither the petitioner nor petitioner's counsel knew of the evidence at the  
129 time of trial or sentencing or in time to include the evidence in any previously filed post-trial  
130 motion or postconviction motion, and the evidence could not have been discovered by the  
131 petitioner or the petitioner's counsel through the exercise of reasonable diligence; or

132 [~~(B)~~] (ii) a court has found ineffective assistance of counsel for failing to exercise  
133 reasonable diligence in uncovering the evidence[~~;~~~~or~~].

134 [~~(C) the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in~~  
135 ~~the interest of justice.]~~

136 (b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the  
137 court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the  
138 court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss  
139 the petition without prejudice and give notice to petitioner and the attorney general of the  
140 dismissal, or the court may enter a finding that based upon the strength of the petition, the  
141 requirements of Subsection (3)(a) are waived in the interest of justice.

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

149 [~~(b)~~] (5) A person who has already obtained postconviction relief that vacated or

150 reversed the person's conviction or sentence may also file a petition under this part in the same  
151 manner and form as described above, if no retrial or appeal regarding this offense is pending.

152 ~~[(3)]~~ (6) If some or all of the evidence alleged to be exonerating is biological evidence  
153 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

154 ~~[(4)]~~ (7) Except as provided in Subsection ~~[(6)]~~ (9), the petition shall be in compliance  
155 with and governed by Rule 65C, Utah Rules of Civil Procedure, and shall include the  
156 underlying criminal case number.

157 ~~[(5)]~~ (8) After a petition is filed under this section, prosecutors, law enforcement  
158 officers, and crime laboratory personnel shall cooperate in preserving evidence and in  
159 determining the sufficiency of the chain of custody of the evidence which is the subject of the  
160 petition.

161 ~~[(6)(a) Notwithstanding paragraphs (g) and (h) of Rule 65C, Utah Rules of Civil~~  
162 ~~Procedure, a]~~

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

166 (b) The assigned judge shall conduct an initial review of the petition. If is it apparent  
167 to the court that the petitioner is either merely relitigating facts, issues or evidence presented in  
168 previous proceedings or presenting issues that appear frivolous or speculative on their face, the  
169 court shall dismiss the petition, state the basis for the dismissal and serve notice of dismissal  
170 upon the petitioner and the attorney general. If, upon completion of the initial review, the court  
171 does not dismiss the petition, it shall order the attorney general to file a response to the petition.  
172 The attorney general shall, within 30 days after receipt of ~~[service of the notice]~~ the court's  
173 order, or within any additional period of time the court allows, answer or otherwise respond to  
174 all proceedings initiated under this part.

175 ~~[(b)(i)]~~ (c) After the time for response by the attorney general under Subsection  
176 ~~[(6)(a)]~~ (9)(b) has passed, the court shall order a hearing if it finds the petition meets the  
177 requirements of Subsections (2) and (3) and finds there is a bona fide [issue as to whether the  
178 petitioner is factually innocent of] and compelling issue of factual innocence regarding the  
179 charges of which the petitioner was convicted. No bona fide and compelling issue of factual  
180 innocence exists if the petitioner is merely relitigating facts, issues or evidence presented in a

181 previous proceeding or if petitioner is unable to identify with sufficient specificity the nature  
182 and reliability of the newly discovered evidence that establishes petitioner's factual innocence.

183 [(†)] (d) If the parties stipulate that the evidence establishes that the petitioner is  
184 factually innocent, the court may find the petitioner is factually innocent without holding a  
185 hearing.

186 [(7)] (10) The court may not grant a petition for a hearing under this part during the  
187 period in which criminal proceedings in the matter are pending before any trial or appellate  
188 court, unless stipulated to by the parties.

189 [(8)] (11) Any victim of a crime that is the subject of a petition under this part, and  
190 who has elected to receive notice under Section 77-38-3, shall be notified by the state's attorney  
191 of any hearing regarding the petition.

192 (12) A petition to determine factual innocence under this part, or Part 3, Postconviction  
193 DNA Testing, shall be filed separately from any petition for post-conviction relief under Part 1,  
194 General Provisions. Separate petitions may be filed simultaneously in the same court.

195 (13) The procedures governing the filing and adjudication of a petition to determine  
196 factual innocence apply to all petitions currently filed or pending, and any new petitions filed  
197 on or after the effective date of this amendment.

198 Section 4. Section **78B-9-404** is amended to read:

199 **78B-9-404. Hearing upon petition -- Procedures -- Court determination of factual**  
200 **innocence.**

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

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

205 (2) The court may consider:

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

207 (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its  
208 weight and credibility.

209 (3) In making its determination the court shall consider, in addition to the evidence  
210 presented at the hearing under this part, [~~all the evidence presented at the original trial~~] the  
211 record of the original criminal case and at any postconviction proceedings in the case.

212 (4) If the court, after considering all the evidence, determines by clear and convincing  
213 evidence that the petitioner:

214 (a) is factually innocent of one or more offenses of which the petitioner was convicted,  
215 the court shall order that those convictions:

216 (i) be vacated with prejudice; and

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

218 (b) did not commit one or more offenses of which the petitioner was convicted, but the  
219 court does not find by clear and convincing evidence that the petitioner did not commit any  
220 lesser included offenses relating to those offenses, the court shall modify the original  
221 conviction and sentence of the petitioner as appropriate for the lesser included offense, whether  
222 or not the lesser included offense was originally submitted to the trier of fact.

223 (5) (a) If the court, after considering all the evidence, does not determine by clear and  
224 convincing evidence that the petitioner is factually innocent of the offense or offenses the  
225 petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny  
226 the petition regarding the offense or offenses.

227 (b) If the court finds that the petition was brought in bad faith, it shall enter the finding  
228 on the record, and the petitioner may not file a second or successive petition under this section  
229 without first applying to and obtaining permission from the court which denied the prior  
230 petition.

231 (6) At least 30 days prior to a hearing on a petition to determine factual innocence, the  
232 petitioner and the respondent shall exchange information regarding the evidence each intends  
233 to present at the hearing. This information shall include:

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

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

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

239 **Section 5. Effective date.**

240 If approved by two-thirds of all the members elected to each house, this bill takes effect  
241 upon approval by the governor, or the day following the constitutional time limit of Utah  
242 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,

243 the date of veto override.

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**S.B. 154 1st Sub. (Green) - Postconviction Remedies Act Amendments**

**Fiscal Note**

2010 General Session

State of Utah

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**State Impact**

Enactment of this bill will not require additional appropriations.

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**Individual, Business and/or Local Impact**

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.

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