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FACTUAL INNOCENCE AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brad L. Dee

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill makes clarifying amendments to factual innocence provisions.

Highlighted Provisions:

This bill:

- ▶ clarifies the requirement of a hearing if the state does not stipulate to factual innocence;
- ▶ clarifies that all proceedings are governed by Utah Rules of Civil Procedure, Rule 65C;
- ▶ sets a standard for the court's determination of factual innocence;
- ▶ disallows prejudgment interest on payments made to a person after a finding of factual innocence; and
- ▶ provides that a claim of factual innocence is extinguished upon the death of the petitioner.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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



28 **78B-9-404**, as last amended by Laws of Utah 2010, Chapter 153

29 **78B-9-405**, as last amended by Laws of Utah 2011, Chapter 131



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

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

33 **78B-9-402. Petition for determination of factual innocence -- Sufficient**
34 **allegations -- Notification of victim.**

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

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

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

42 (ii) the specific evidence identified by the petitioner in the petition establishes
43 innocence;

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

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

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

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

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

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

58 (ii) a court has found ineffective assistance of counsel for failing to exercise reasonable

59 diligence in uncovering the evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

114 (12) A petition to determine factual innocence under this part, or Part 3, Postconviction
115 Testing of DNA, shall be filed separately from any petition for postconviction relief under Part
116 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

117 (13) The procedures governing the filing and adjudication of a petition to determine
118 factual innocence apply to all petitions currently filed or pending and any new petitions filed on
119 or after ~~[the effective date of this amendment]~~ March 25, 2010.

120 (14) A claim for determination of factual innocence under this part is extinguished

121 upon the death of the petitioner.

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

123 **78B-9-404. Hearing upon petition -- Procedures -- Court determination of factual**
124 **innocence.**

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

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

129 (2) The court may consider:

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

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

133 (3) In making its determination the court shall consider, in addition to the evidence
134 presented at the hearing under this part, the record of the original criminal case and at any
135 postconviction proceedings in the case.

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

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

140 (i) be vacated with prejudice; and

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

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

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

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

152 on the record, and the petitioner may not file a second or successive petition under this section
153 without first applying to and obtaining permission from the court which denied the prior
154 petition.

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

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

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

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

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

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

168 (b) the determination is based upon the newly discovered material evidence described
169 in the petition, pursuant to Subsection 78B-9-402(2)(a), and as defined in Subsection
170 78B-9-401.5(3).

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

172 **78B-9-405. Judgment and assistance payment.**

173 (1) (a) If a court finds a petitioner factually innocent under [~~Title 78B, Chapter 9;~~] Part
174 3, Postconviction Testing of DNA, or under this part, and if the petitioner has served a period
175 of incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall
176 receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of
177 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah,
178 as determined by the data most recently published by the Department of Workforce Services at
179 the time of the petitioner's release from prison.

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

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

184 (a) The Utah Office for Victims of Crime shall pay from the Crime Victim Reparations
185 Fund to the petitioner within 45 days of the court order under Subsection (1) an initial sum
186 equal to either 20% of the total financial assistance payment as determined under Subsection
187 (1) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the
188 total amount owed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

229 (5) Payments pursuant to this section:

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

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

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

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

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

242 (7) A petitioner found to be factually innocent under [~~Title 78B, Chapter 9,~~] Part 3,
243 Postconviction Testing of DNA, or this part shall have access to the same services and
244 programs available to Utah citizens generally as though the conviction for which the petitioner

245 was found to be factually innocent had never occurred.

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

Legislative Review Note
as of 1-24-12 2:57 PM

Office of Legislative Research and General Counsel