

**FACTUAL INNOCENCE ASSISTANCE AMENDMENTS**

2013 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Gage Froerer**

Senate Sponsor: Todd Weiler

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**LONG TITLE**

**General Description:**

This bill modifies the Judicial Code regarding postconviction determinations of factual innocence.

**Highlighted Provisions:**

This bill:

▸ modifies provisions regarding financial assistance to a person found to have been wrongfully convicted, to provide that if the person dies, the financial assistance payment shall be paid to the person's surviving spouse; and

▸ provides that if the spouse has caused the death of the person by the commission of a disqualifying homicide, the survivor forfeits all right to payments.

**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 2012, Chapter 220

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

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



28           **78B-9-402. Petition for determination of factual innocence -- Sufficient**  
29 **allegations -- Notification of victim.**

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

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

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

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

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

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

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

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

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

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

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

55           (b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the  
56 court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the  
57 court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss  
58 the petition without prejudice and give notice to the petitioner and the attorney general of the

59 dismissal, or the court may waive the requirements of Subsection (3)(a) if the court finds the  
60 petition should proceed to hearing based upon the strength of the petition, and that there is  
61 other evidence that could have been discovered through the exercise of reasonable diligence by  
62 the petitioner or the petitioner's counsel at trial, and the other evidence:

- 63 (i) was not discovered by the petitioner or the petitioner's counsel;  
64 (ii) is material upon the issue of factual innocence; and  
65 (iii) has never been presented to a court.

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 in the district court and any  
119 new petitions filed on or after June 1, 2012.

120 (14) (a) As used in this Subsection (14), "spouse" means the legal relationship:

121 (i) established between a man and a woman as recognized by the laws of this state; and  
122 (ii) existing at the time of the petitioner's death.

123 (b) A claim for determination of factual innocence under this part is not extinguished  
124 upon the death of the petitioner. [~~The assistance payment provisions of Section 78B-9-405~~  
125 may not apply, and financial payments may not be made, if]

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

131 Payments cease upon the death of the spouse.

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

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**Legislative Review Note**  
as of 1-25-13 4:28 PM

**Office of Legislative Research and General Counsel**