

EXONERATION AND INNOCENCE

ASSISTANCE

2007 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: David Litvack

Senate Sponsor: Lyle W. Hillyard

LONG TITLE

General Description:

This bill modifies provisions regarding postconviction DNA testing and creates a process for postconviction claims of factual innocence, and for financial assistance if the petitioner is found to be factually innocent.

Highlighted Provisions:

This bill:

- ▶ tolls the statute of limitations during a postconviction:
 - petition for DNA testing for exoneration; or
 - petition claiming factual innocence;
- ▶ changes current references to "actually innocent" to "factually innocent" regarding postconviction DNA testing;
- ▶ establishes a process for a postconviction petition and hearing to determine factual innocence regarding a felony conviction, including:
 - defining factual innocence;
 - grounds for filing a petition;
 - grounds for presentation of evidence that may be considered by the court, including newly discovered evidence;
 - right of the victims to attend the hearing; and
 - appointment of pro bono counsel;



28 ▶ provides that a petitioner who is convicted of a felony and is imprisoned, and is then
29 found to be factually innocent, is entitled to financial assistance from the state for
30 the period of imprisonment;

31 ▶ provides that the financial assistance amount shall be the monetary equivalent of the
32 average annual wage for a single wage earner in Utah, for each year of
33 imprisonment ~~to~~ , **for a maximum of 15 years of imprisonment** ~~to~~ ; and

34 ▶ provides that a petitioner found to be factually innocent shall receive two years'
35 financial assistance in a lump sum, and the balance shall be paid out quarterly to the
36 person from the Commission on Criminal and Juvenile Justice beginning no later
37 than one year after the appropriation is made and ending no later than ten years after
38 the appropriation is made.

39 **Monies Appropriated in this Bill:**

40 None

41 **Other Special Clauses:**

42 None

43 **Utah Code Sections Affected:**

44 AMENDS:

45 **78-35a-107**, as last amended by Chapter 139, Laws of Utah 2004

46 **78-35a-301**, as enacted by Chapter 261, Laws of Utah 2001

47 **78-35a-303**, as enacted by Chapter 261, Laws of Utah 2001

48 ENACTS:

49 **78-35a-300.5**, Utah Code Annotated 1953

50 **78-35A-401**, Utah Code Annotated 1953

51 **78-35a-402**, Utah Code Annotated 1953

52 **78-35a-403**, Utah Code Annotated 1953

53 **78-35a-404**, Utah Code Annotated 1953

54 **78-35a-405**, Utah Code Annotated 1953



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

57 Section 1. Section **78-35a-107** is amended to read:

58 **78-35a-107. Statute of limitations for postconviction relief.**

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

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

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

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

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

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

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

73 (3) If the court finds that the interests of justice require, a court may excuse a
74 petitioner's failure to file within the time limitations.

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

77 (a) exoneration through DNA testing under Section 78-35a-303; or

78 (b) factual innocence under Section 78-35a-401.

79 [~~4~~] (5) Sections 77-19-8, 78-12-35, and 78-12-40 do not extend the limitations period
80 established in this section.

81 Section 2. Section **78-35a-300.5** is enacted to read:

82 **Part 3. Postconviction DNA Testing**

83 **78-35a-300.5. Title.**

84 This part is known as "Postconviction DNA Testing."

85 Section 3. Section **78-35a-301** is amended to read:

86 **78-35a-301. Postconviction testing of DNA -- Petition -- Sufficient allegations --**
87 **Notification of victim.**

88 (1) As used in this part[;]:

89 (a) "DNA" means deoxyribonucleic acid.

90 (b) "Factually innocent" has the same definition as in Section 78-35a-402.

91 (2) A person convicted of a felony offense may at any time file a petition for
92 postconviction DNA testing in the trial court that entered the judgment of conviction against
93 him if the person asserts his [~~actual~~] factual innocence under oath and the petition alleges:

94 (a) evidence has been obtained regarding the person's case which is still in existence
95 and is in a condition that allows DNA testing to be conducted;

96 (b) the chain of custody is sufficient to establish that the evidence has not been altered
97 in any material aspect;

98 (c) the person identifies the specific evidence to be tested and states a theory of
99 defense, not inconsistent with theories previously asserted at trial, that the requested DNA
100 testing would support;

101 (d) the evidence was not previously subjected to DNA testing, or if the evidence was
102 tested previously, the evidence was not subjected to the testing that is now requested, and the
103 new testing may resolve an issue not resolved by the prior testing;

104 (e) the evidence that is the subject of the request for testing has the potential to produce
105 new, noncumulative evidence that will establish the person's [~~actual~~] factual innocence; and

106 (f) the person is aware of the consequences of filing the petition, including those
107 specified in Sections 78-35a-302 and 78-35a-304, and that the person is waiving any statute of
108 limitations in all jurisdictions as to any felony offense [~~he~~] the person has committed which is
109 identified through DNA database comparison.

110 (3) The petition under Subsection (2) shall be in compliance with Rule 65C, Utah
111 Rules of Civil Procedure, including providing the underlying criminal case number.

112 (4) The court may not order DNA testing in cases in which DNA testing was available
113 at the time of trial and the person did not request DNA testing or present DNA evidence for
114 tactical reasons.

115 (5) After a petition is filed under this section, prosecutors, law enforcement officers,
116 and crime laboratory personnel have a duty to cooperate in preserving evidence and in
117 determining the sufficiency of the chain of custody of the evidence which may be subject to
118 DNA testing.

119 (6) (a) A person who files a petition under this section shall serve notice upon the
120 office of the prosecutor who obtained the conviction, and upon the [~~state~~] Utah attorney

121 general. The attorney general shall, within 30 days after receipt of service of a copy of the
122 petition, or within any additional period of time the court allows, answer or otherwise respond
123 to all proceedings initiated under this part.

124 (b) After the attorney general is given an opportunity to respond to a petition for
125 postconviction DNA testing, the court shall order DNA testing if it finds by a preponderance of
126 the evidence that all criteria of Subsection (2) have been met.

127 (7) (a) If the court grants the petition for testing, the DNA test shall be performed by
128 the Utah State Crime Laboratory within the Criminal Investigations and Technical Services
129 Division created in Section 53-10-103, unless the person establishes that the state crime
130 laboratory has a conflict of interest or does not have the capability to perform the necessary
131 testing.

132 (b) If the court orders that the testing be conducted by any laboratory other than the
133 state crime laboratory, the court shall require that the testing be performed under reasonable
134 conditions designed to protect the state's interests in the integrity of the evidence, and that the
135 testing be performed according to accepted scientific standards and procedures.

136 (8) If the person is serving a sentence of imprisonment and is indigent, the state shall
137 pay for the costs of the testing under this part, but if the result is not favorable to the person the
138 court may order the person to reimburse the state for the costs of the testing, pursuant to the
139 provisions of Subsections 78-35a-302(4) and 78-35a-304(1)(b).

140 (9) Any victim of the crime regarding which the person petitions for DNA testing, who
141 has elected to receive notice under Section 77-38-3 shall be notified by the state's attorney of
142 any hearing regarding the petition and testing, even though the hearing is a civil proceeding.

143 Section 4. Section **78-35a-303** is amended to read:

144 **78-35a-303. Consequences of postconviction DNA testing when result is favorable**
145 **to person -- Procedures.**

146 (1) (a) If the result of postconviction DNA testing is favorable to the person, the person
147 may file a motion to vacate his conviction. The court shall give the state 30 days to respond in
148 writing, to present evidence, and to be heard in oral argument prior to issuing an order to vacate
149 the conviction. The state may by motion request an extension of the 30 days, which the court
150 may grant upon good cause shown.

151 (b) The state may stipulate to the conviction being vacated, or may request a hearing

152 and attempt to demonstrate through evidence and argument that, despite the DNA test results,
 153 the state possesses sufficient evidence of the person's guilt so that he is unable to demonstrate
 154 by clear and convincing evidence that he is [~~actually~~] factually innocent of one or more
 155 offenses of which he was convicted, and all the lesser included offenses related to those
 156 offenses.

157 (2) (a) If the result of postconviction DNA testing is favorable to the person and the
 158 state opposes vacating the conviction, the court shall consider all the evidence presented at the
 159 original trial and at the hearing under Subsection (1)(b), including the new DNA test result.
 160 Evidence that would otherwise have been suppressed at criminal trial is admissible, unless the
 161 evidence is an unconstitutionally coerced statement from the person.

162 (b) If the court, after considering all the evidence, determines that the DNA test result
 163 demonstrates by clear and convincing evidence that the person is [~~actually~~] factually innocent
 164 of one or more offenses of which the person was convicted ~~and all lesser included offenses~~
 165 ~~relating to those offenses]~~ , the court shall order that those convictions be vacated with prejudice
 166 and those convictions be expunged from the person's record.

167 (c) If the court, after considering all the evidence presented at the original trial and at
 168 the hearing under Subsection (1)(b), including the new DNA test result, finds by clear and
 169 convincing evidence that the person ~~is~~ [~~is~~] [~~actually~~] ~~factually innocent of~~ did not
 169a commit ~~one or more offenses of~~
 170 which the person was convicted, but the court does not find by clear and convincing evidence
 171 that the person ~~is~~ [~~is~~] [~~actually~~] ~~factually innocent of all~~ did not commit any ~~any~~
 171a lesser included offenses relating to those
 172 offenses, the court shall modify the original conviction and sentence of the person as
 173 appropriate for the lesser included offense, whether or not the lesser included offense was
 174 originally submitted to the trier of fact.

175 (d) If the court, after considering all the evidence presented at the original trial and at
 176 the hearing under Subsection (1)(b), including the new DNA test result, does not find by clear
 177 and convincing evidence that the person is [~~actually~~] factually innocent of the offense or
 178 offenses the person is challenging ~~and does not find that Subsection (2)(c) applies~~ , the
 178a court shall deny the person's petition regarding the
 179 offense or offenses.

180 (e) Any party may appeal from the trial court's final ruling on the petition under this
 181 part.

182 Section 5. Section **78-35a-401** is enacted to read:

183 **Part 4. Postconviction Determination of Factual Innocence**

184 **78-35a-401. Title.**

185 This part is known as "Postconviction Determination of Factual Innocence."

186 Section 6. Section **78-35a-402** is enacted to read:

187 **78-35a-402. Petition for determination of factual innocence -- Sufficient**
188 **allegations -- Notification of victim.**

189 As used in this part:

190 (1) "Factually innocent" means a person did not:

191 (a) engage in the conduct for which he was convicted;

192 (b) engage in conduct relating to any lesser included offenses; or

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

195 (2) (a) A person who has been convicted of a felony offense may petition the district
196 court in the county in which the person was convicted for a hearing to establish that he is
197 factually innocent of the crime or crimes of which he was convicted, if he asserts his factual
198 innocence under oath and the petition alleges:

199 (i) newly discovered material evidence exists that establishes that the petitioner is
200 factually innocent;

201 (ii) the petitioner identifies the specific evidence he claims establishes his innocence;

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

203 (iv) the material evidence is not merely impeachment evidence;

204 (v) viewed with all the other evidence, the newly discovered evidence demonstrates
205 that the petitioner is factually innocent; and

206 (vi) (A) neither the petitioner nor petitioner's counsel knew of the evidence at the time
207 of trial or sentencing or in time to include the evidence in any previously filed posttrial motion
208 or postconviction motion, the evidence could not have been discovered by the petitioner or his
209 counsel through the exercise of reasonable diligence;

210 (B) a court has found ineffective assistance of counsel for failing to exercise reasonable
211 diligence in uncovering the evidence; or

212 (C) the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(iv)(B) in the
213 interest of justice.

214 (b) A person who has already obtained postconviction relief that vacated or reversed
215 the person's conviction may also file a petition under this part if no retrial or appeal regarding
216 this offense is pending.

217 (3) If some or all of the evidence alleged to be exonerating is biological evidence
218 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78-35a-301.

219 (4) The petition shall be in compliance with Rule 65C, Utah Rules of Civil Procedure,
220 and shall include the underlying criminal case number.

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

224 (6) (a) A person who files a petition under this section shall serve notice of the petition
225 and a copy of the petition upon the office of the prosecutor who obtained the conviction and
226 upon the Utah attorney general. The attorney general shall, within 30 days after receipt of
227 service of the notice, or within any additional period of time the court allows, answer or
228 otherwise respond to all proceedings initiated under this part.

229 (b) (i) After the time for response by the attorney general under Subsection (6)(a) has
230 passed, the court shall order a hearing if it finds there is a bona fide issue as to whether the
231 petitioner is factually innocent of the charges of which he was convicted.

232 (ii) If the parties stipulate that the evidence establishes that the petitioner is factually
233 innocent, the court may find the petitioner is factually innocent without holding a hearing.

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

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

240 Section 7. Section **78-35a-403** is enacted to read:

241 **78-35a-403. Requests for appointment of counsel -- Appeals -- Postconviction**
242 **petitions.**

243 (1) Subsections 78-35a-109(1) and (2), regarding the appointment of pro bono counsel,
244 apply to any request for the appointment of counsel under this part.

245 (2) Subsection 78-35a-109(3), regarding effectiveness of counsel, applies to
 246 subsequent postconviction petitions and to appeals under this part.

247 Section 8. Section **78-35a-404** is enacted to read:

248 **78-35a-404. Hearing upon petition -- Procedures -- Court determination of factual**
 249 **innocence.**

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

252 (b) The burden is upon the petitioner to establish his factual innocence by clear and
 253 convincing evidence.

254 (2) (a) Evidence that was or would be suppressed at a criminal trial is admissible,
 255 unless the evidence is an unconstitutionally coerced statement from the petitioner.

256 (b) Hearsay evidence which would be inadmissible at trial is admissible, although the
 257 court may consider the fact it is hearsay in evaluating its weight and credibility.

258 (3) In making its determination the court shall consider, in addition to the evidence
 259 presented at the hearing under this part, all the evidence presented at the original trial and at
 260 any postconviction proceedings in the case.

261 (4) If the court, after considering all the evidence, determines by clear and convincing
 262 evidence that the petitioner ~~is~~ :

263 (a) ~~is~~ ~~factually innocent of one or more offenses of which he was convicted~~
 263a ~~is~~ [~~and all lesser~~

264 ~~included offenses relating to those offenses]~~ ~~, the court shall order that those convictions be~~
 265 vacated with prejudice and those convictions be expunged from the petitioner's record; or

266 (b) ~~is~~ [~~factually innocent of]~~ ~~did not commit~~ ~~one or more offenses of which the~~
 266a petitioner was convicted,

267 but the court does not find by clear and convincing evidence that the petitioner ~~is~~ [~~is factually~~
 268 ~~innocent of all]~~ ~~did not commit any~~ ~~lesser included offenses relating to those offenses, the~~

268a court shall modify the
 269 original conviction and sentence of the petitioner as appropriate for the lesser included offense,
 270 whether or not the lesser included offense was originally submitted to the trier of fact.

271 (5) (a) If the court, after considering all the evidence, does not determine by clear and
 272 convincing evidence that the petitioner is factually innocent of the offense or offenses he is
 273 challenging ~~is~~ **and does not find that Subsection (4)(b) applies** ~~,~~ the court shall deny the
 273a petition regarding the offense or offenses.

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

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

278 Section 9. Section **78-35a-405** is enacted to read:

279 **78-35a-405. Judgment and assistance payment.**

280 (1) (a) If a court finds a petitioner factually innocent under Title 78, Chapter 35a, Part
281 3, Postconviction DNA Testing, or under this part, and if the petitioner has served a period of
282 incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall
283 receive, for each year or portion of a year the petitioner was incarcerated, ~~Ĥ~~→ **up to a maximum of**
283a **15 years, ←Ĥ** the monetary
284 equivalent of the average annual wage for a single wage earner in Utah for the year the
285 petitioner was released from prison, as determined by the Department of Workforce Services.

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

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

290 (a) The Office of Crime Victim Reparations shall pay from the Crime Victim
291 Reparations Fund to the petitioner within 45 days of the court order under Subsection (1) an
292 initial sum equal to either 20% of the total financial assistance payment as determined under
293 Subsection (1) or an amount equal to two years of incarceration, whichever is greater, but not
294 to exceed the total amount owed.

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

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

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

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

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

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

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

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

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

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

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

323 (c) The reduction of payments pursuant to Subsection (3)(a) or the tolling of payments
324 pursuant to Subsection (3)(b) shall be determined by the same court that finds a petitioner to be
325 factually innocent under Title 78, Chapter 35a, Part 3, Postconviction DNA Testing, or this
326 part.

327 (4) (a) A person is ineligible for any payments under this part if the person was already
328 serving a prison sentence in another jurisdiction at the time of the conviction of the crime for
329 which that person has been found factually innocent pursuant to the provisions of Title 78,
330 Chapter 35a, Part 3, Postconviction DNA Testing, or this part, and that person is to be returned
331 to that other jurisdiction upon release for further incarceration on the prior conviction.

332 (b) Ineligibility for any payments pursuant to this Subsection (4) shall be determined by
333 the same court that finds a person to be factually innocent under Title 78, Chapter 35a, Part 3,
334 Postconviction DNA Testing, or this part.

335 (5) (a) Payments pursuant to this section are not subject to any Utah state taxes.

336 (b) Payments pursuant to this section may not be offset by ~~H~~ [:

337 ~~(i)~~ ~~H~~ any expenses incurred by the state or any political subdivision of the state, including

338 expenses incurred to secure the petitioner's custody, or to feed, clothe, or provide medical
339 services for the petitioner ~~H→ [; or~~

340 ~~—— (ii) the value of any services or the value of any reduction in fees for services to be~~
341 ~~provided to the petitioner as a part of the payment] ←H .~~

342 (6) If a court finds a petitioner to be factually innocent under Title 78, Chapter 35a,
343 Part 3, Postconviction DNA Testing, or this part, the court shall also:

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

346 (b) provide a letter to the petitioner explaining that his conviction has been vacated on
347 the grounds of factual innocence and indicating that the petitioner did not commit the crime or
348 crimes for which he was convicted and was later found to be factually innocent under Title 78,
349 Chapter 35a, Part 3, Postconviction DNA Testing, or this part.

350 (7) A petitioner found to be factually innocent under Title 78, Chapter 35a, Part 3,
351 Postconviction DNA Testing, or this part shall have access to the same services and programs
352 available to Utah citizens generally as though the conviction for which the petitioner was found
353 to be factually innocent had never occurred.

354 (8) Payments pursuant to this part constitute a full and conclusive resolution of the
355 petitioner's claims on the specific issue of factual innocence.

Legislative Review Note
as of 1-9-07 9:58 AM

Office of Legislative Research and General Counsel

H.B. 154 - Exoneration and Innocence Assistance

Fiscal Note

2007 General Session
State of Utah

State Impact

Enactment of this bill will require an ongoing appropriation of \$5,500 from the General Fund for the Courts for staff and related costs.

	<u>FY 2007 Approp.</u>	<u>FY 2008 Approp.</u>	<u>FY 2009 Approp.</u>	<u>FY 2007 Revenue</u>	<u>FY 2008 Revenue</u>	<u>FY 2009 Revenue</u>
General Fund	\$0	\$5,500	\$5,500	\$0	\$0	\$0
Total	\$0	\$5,500	\$5,500	\$0	\$0	\$0

Individual, Business and/or Local Impact

Enactment of this bill will result in direct, measurable benefits for individuals, businesses, or local governments.