

**EXONERATION AND INNOCENCE**

**ASSISTANCE**

2007 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: David Litvack**

Senate Sponsor: Lyle W. Hillyard

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**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; 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 [~~actually~~] factually innocent of 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 [~~actually~~] factually innocent of all 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, the 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) factually innocent of one or more offenses of which he was convicted 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) factually innocent of one or more offenses of which the petitioner was convicted,  
267 but the court does not find by clear and convincing evidence that the petitioner is factually  
268 innocent of all lesser included offenses relating to those offenses, the 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, the court shall deny the 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, 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:

337 (i) 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; 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.

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.

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

**Office of Legislative Research and General Counsel**

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**H.B. 154 - Exoneration and Innocence Assistance**

**Fiscal Note**

2007 General Session  
State of Utah

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

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

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