

POST-CONVICTION REMEDIES ACT

REVISIONS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Gregory S. Bell

House Sponsor: Stephen H. Urquhart

LONG TITLE

General Description:

This bill amends the Post-Conviction Remedies Act.

Highlighted Provisions:

This bill:

- establishes procedures and requirements for post-conviction actions by a person convicted of a criminal offense.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-9-101, as renumbered and amended by Laws of Utah 2008, Chapter 3

78B-9-102, as renumbered and amended by Laws of Utah 2008, Chapter 3

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

78B-9-105, as renumbered and amended by Laws of Utah 2008, Chapter 3

78B-9-106, as renumbered and amended by Laws of Utah 2008, Chapter 3

78B-9-107, as renumbered and amended by Laws of Utah 2008, Chapter 3

78B-9-108, as renumbered and amended by Laws of Utah 2008, Chapter 3



28 **78B-9-109**, as renumbered and amended by Laws of Utah 2008, Chapter 3

29 **78B-9-202**, as renumbered and amended by Laws of Utah 2008, Chapter 3

30

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

31 Section 1. Section **78B-9-101** is amended to read:

32 **78B-9-101. Title.**

33 This ~~[act shall be]~~ chapter is known as the "Post-Conviction Remedies Act."

34 Section 2. Section **78B-9-102** is amended to read:

35 **78B-9-102. Replacement of prior remedies.**

36 (1) This chapter establishes ~~[a substantive legal]~~ the sole remedy for any person who
37 challenges a conviction or sentence for a criminal offense and who has exhausted all other legal
38 remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces
39 all prior remedies for review, including extraordinary or common law writs. Proceedings under
40 this chapter are civil and are governed by the rules of civil procedure. Procedural provisions
41 for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil
42 Procedure.

43 (2) This chapter does not apply to:

44 (a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal
45 offense;

46 (b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal
47 Procedure; or

48 (c) actions taken by the Board of Pardons and Parole.

49 Section 3. Section **78B-9-104** is amended to read:

50 **78B-9-104. Grounds for relief -- Retroactivity of rule.**

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

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

57 (b) the conviction was obtained or the sentence was imposed under a statute that is in
58

violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed ~~[in an unlawful manner,]~~ or probation was revoked in ~~[an unlawful manner]~~ violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; ~~[or]~~

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

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

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

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

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received[:]; or

~~[(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.]~~

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

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

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

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

introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA , or Part 4, Post-Conviction Determination of Factual Innocence.

Section 4. Section **78B-9-105** is amended to read:

78B-9-105. Burden of proof.

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.

~~§→ [(2) The court may not enter a default judgment against the state.] ←§~~ The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

~~§→ [(3)] (2) ←§~~ The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Section 5. Section **78B-9-106** is amended to read:

78B-9-106. Preclusion of relief -- Exception.

(1) A person is not eligible for relief under this chapter upon any ground that:

- (a) may still be raised on direct appeal or by a post-trial motion;
- (b) was raised or addressed at trial or on appeal;
- (c) could have been but was not raised at trial or on appeal;
- (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
- (e) is barred by the limitation period established in Section 78B-9-107.

~~§→ [(2) A time bar or procedural bar may be waived by the state only in a written waiver filed in the action and served on the petitioner.] ←§~~ The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief ~~§→~~ , **unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.** ~~←§~~ . Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

~~[(2)] (3)~~ Notwithstanding Subsection (1)(c), a person may be eligible for relief on a

basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

Section 6. Section **78B-9-107** is amended to read:

78B-9-107. Statute of limitations for postconviction relief.

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

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

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

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

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

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

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based~~[-]; or~~

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

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

Section 7. Section **78B-9-108** is amended to read:

78B-9-108. Effect of granting relief -- Notice.

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice of intent to appeal the court's decision, the stay provided for by Subsection (2)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Section 77-20-10 and URCP 27.

~~[(c)]~~ (d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Section 8. Section **78B-9-109** is amended to read:

78B-9-109. Appointment of pro bono counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the

183 assistance of counsel for proper adjudication.

184 (3) An allegation that counsel appointed under this section was ineffective cannot be
185 the basis for relief in any subsequent post-conviction petition.

186 Section 9. Section **78B-9-202** is amended to read:

187 **78B-9-202. Appointment and payment of counsel in death penalty cases.**

188 (1) A person who has been sentenced to death and whose conviction and sentence has
189 been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled
190 no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter
191 allowing challenges to the conviction and death sentence and the appointment of counsel for
192 indigent ~~[defendants]~~ petitioners.

193 (2) (a) If a ~~[defendant]~~ petitioner requests the court to appoint counsel, the court shall
194 determine whether the ~~[defendant]~~ petitioner is indigent and make findings on the record
195 regarding the ~~[defendant's]~~ petitioner's indigency. If the court finds that the ~~[defendant]~~
196 petitioner is indigent, it shall, subject to the provisions of Subsection (5), promptly appoint
197 counsel who is qualified to represent ~~[defendants in]~~ petitioners in post-conviction death
198 penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure. Counsel who
199 represented the petitioner at trial or on the direct appeal may not be appointed to represent the
200 petitioner under this section.

201 (b) A ~~[defendant]~~ petitioner who wishes to reject the offer of counsel shall be advised
202 on the record by the court of the consequences of the rejection before the court may accept the
203 rejection.

204 ~~[(c) Costs of counsel and other reasonable]~~

205 (3) Attorney fees and litigation expenses incurred in providing the representation
206 provided for in this section and that the court has determined are reasonable shall be paid from
207 state funds by the Division of Finance according to rules established pursuant to Title 63,
208 Chapter 46a, Utah Administrative Rulemaking Act.

209 (a) In determining whether the requested funds are reasonable, the court should
210 consider:

211 (i) the extent to which the petitioner requests funds to investigate and develop evidence
212 and legal arguments that duplicate the evidence presented and arguments raised in the criminal
213 proceeding; and

214 (ii) whether the petitioner has established that the requested funds are necessary to
215 develop evidence and legal arguments that are reasonably likely to support post-conviction
216 relief.

217 (b) The court may authorize payment of attorney fees at a rate of \$125 per hour up to a
218 maximum of \$60,000. The court may exceed the maximum only upon a showing of good
219 cause as established in Subsections (3)(e) and (f).

220 (c) The court may authorize litigation expenses up to a maximum of \$20,000. The
221 court may exceed the maximum only upon a showing of good cause as established in
222 Subsections (3)(e) and (f).

223 (d) The court may authorize the petitioner to apply ex parte for the funds permitted in
224 Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes
225 the need for confidentiality. The motion to proceed ex parte must be served on counsel
226 representing the state, and the court may not grant the motion without giving the state an
227 opportunity to respond.

228 (e) In determining whether good cause exists to exceed the maximum sums established
229 in Subsections (3)(b) and (c), the court shall consider:

230 (i) the extent to which the work done to date and the further work identified by the
231 petitioner duplicates work and investigation performed during the criminal case under review;
232 and

233 (ii) whether the petitioner has established that the work done to date and the further
234 work identified is reasonably likely to develop evidence or legal arguments that will ~~§→~~ **[entitle the**
235 **petitioner to] support** ~~←§~~ post-conviction relief.

236 (f) The court may permit payment in excess of the maximum amounts established in
237 Subsections (3)(b) and (c) only on the petitioner's motion, provided that:

238 (i) if the court has granted a motion to file ex parte applications under Subsection
239 (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant
240 attorney general employed in a division other than the one in which the attorney is employed
241 who represents the state in the post-conviction case; if the court has not granted a motion to file
242 ex parte applications, then the petitioner must serve the attorney representing the state in the
243 post-conviction matter with the motion to exceed the maximum funds;

244 (ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney

245 general may not disclose to the attorney representing the state in the post-conviction matter any
246 material the petitioner provides in support of the motion except upon a determination by the
247 court that the material is not protected by or that the petitioner has waived the attorney client
248 privilege or work product doctrine; and

249 (iii) the court gives the state an opportunity to respond to the request for funds in
250 excess of the maximum amounts provided in Subsections (3)(b) and (c).

251 (4) Nothing in this chapter shall be construed as creating the right to the effective
252 assistance of post-conviction counsel, and relief may not be granted on any claim that
253 post-conviction counsel was ineffective.

254 (5) If within 60 days of the request for counsel the court cannot find counsel willing to
255 accept the appointment, the court shall notify the petitioner and the state's counsel in writing.
256 In that event, the petitioner may elect to proceed pro se by serving written notice of that
257 election on the court and state's counsel within 30 days of the court's notice that no counsel
258 could be found. If within 30 days of its notice to the petitioner the court receives no notice that
259 the petitioner elects to proceed pro se, the court shall dismiss any pending post-conviction
260 actions and vacate any execution stays, and the state may initiate proceedings under Section
261 77-19-9 to issue an execution warrant.

Legislative Review Note

as of 2-12-08 12:36 PM

Office of Legislative Research and General Counsel

S.B. 277 - Post-conviction Remedies Act Revisions**Fiscal Note**

2008 General Session

State of Utah

State Impact

Enactment of this bill will require ongoing General Funds to the Department to Finance of \$50,000 beginning in FY 2009. Additional appropriations may be required in the future depending on growth.

	FY 2008 <u>Approp.</u>	FY 2009 <u>Approp.</u>	FY 2010 <u>Approp.</u>	FY 2008 <u>Revenue</u>	FY 2009 <u>Revenue</u>	FY 2010 <u>Revenue</u>
General Fund	\$0	\$50,000	\$50,000	\$0	\$0	\$0
Total	\$0	\$50,000	\$50,000	\$0	\$0	\$0

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.