

POST-CONVICTION REMEDIES ACT

REVISIONS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Gregory S. Bell

House Sponsor: Stephen H. Urquhart

Cosponsor: Curtis S. Bramble

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

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

30 **78B-9-202**, as renumbered and amended by Laws of Utah 2008, Chapter 3



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

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

34 **78B-9-101. Title.**

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

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

37 **78B-9-102. Replacement of prior remedies.**

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

44 (2) This chapter does not apply to:

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

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

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

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

51 **78B-9-104. Grounds for relief -- Retroactivity of rule.**

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

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

58 (b) the conviction was obtained or the sentence was imposed under a statute that is in
59 violation of the United States Constitution or Utah Constitution, or the conduct for which the
60 petitioner was prosecuted is constitutionally protected;

61 (c) the sentence was imposed [~~in an unlawful manner,~~] or probation was revoked in [~~an~~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

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

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

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

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

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

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

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

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

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

85 (ii) the rule decriminalizes the conduct that comprises the elements of the crime for

86 which the petitioner was convicted.

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

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

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

96 **78B-9-105. Burden of proof.**

97 (1) The petitioner has the burden of pleading and proving by a preponderance of the
98 evidence the facts necessary to entitle the petitioner to relief. The court may not grant relief
99 without determining that the petitioner is entitled to relief under the provisions of this chapter
100 and in light of the entire record, including the record from the criminal case under review.

101 (2) The respondent has the burden of pleading any ground of preclusion under Section
102 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its
103 existence by a preponderance of the evidence.

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

105 **78B-9-106. Preclusion of relief -- Exception.**

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

107 (a) may still be raised on direct appeal or by a post-trial motion;

108 (b) was raised or addressed at trial or on appeal;

109 (c) could have been but was not raised at trial or on appeal;

110 (d) was raised or addressed in any previous request for post-conviction relief or could
111 have been, but was not, raised in a previous request for post-conviction relief; or

112 (e) is barred by the limitation period established in Section 78B-9-107.

113 (2) The state may raise any of the procedural bars or time bar at any time, including

114 during the state's appeal from an order granting post-conviction relief, unless the court
115 determines that the state should have raised the time bar or procedural bar at an earlier time.
116 Any court may raise a procedural bar or time bar on its own motion, provided that it gives the
117 parties notice and an opportunity to be heard.

118 [~~2~~] (3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a
119 basis that the ground could have been but was not raised at trial or on appeal, if the failure to
120 raise that ground was due to ineffective assistance of counsel.

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

122 **78B-9-107. Statute of limitations for postconviction relief.**

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

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

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

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

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

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

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

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

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

141 (3) The limitations period is tolled for any period during which the petitioner was

142 prevented from filing a petition due to state action in violation of the United States Constitution,
143 or due to physical or mental incapacity. The petitioner has the burden of proving by a
144 preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

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

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

148 **78B-9-108. Effect of granting relief -- Notice.**

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

150 (a) modify the original conviction or sentence; or

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

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

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

160 (c) If the respondent gives notice of intent to appeal the court's decision, the stay
161 provided for by Subsection (2)(a) shall remain in effect until the appeal concludes, including any
162 petitions for rehearing or for discretionary review by a higher court. The court may lift the stay
163 if the petitioner can make the showing required for a certificate of probable cause under Section
164 77-20-10 and URCP 27.

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

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

169 **78B-9-109. Appointment of pro bono counsel.**

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

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

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

179 (b) whether the petition involves complicated issues of law or fact that require the
180 assistance of counsel for proper adjudication.

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

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

184 **78B-9-202. Appointment and payment of counsel in death penalty cases.**

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

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

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

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

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

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

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

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

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

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

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

225 (e) In determining whether good cause exists to exceed the maximum sums established

226 in Subsections (3)(b) and (c), the court shall consider:

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

230 (ii) whether the petitioner has established that the work done to date and the further
231 work identified is reasonably likely to develop evidence or legal arguments that will support
232 post-conviction relief.

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

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

241 (ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney
242 general may not disclose to the attorney representing the state in the post-conviction matter any
243 material the petitioner provides in support of the motion except upon a determination by the
244 court that the material is not protected by or that the petitioner has waived the attorney client
245 privilege or work product doctrine; and

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

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

251 (5) If within 60 days of the request for counsel the court cannot find counsel willing to
252 accept the appointment, the court shall notify the petitioner and the state's counsel in writing. In
253 that event, the petitioner may elect to proceed pro se by serving written notice of that election

254 on the court and state's counsel within 30 days of the court's notice that no counsel could be
255 found. If within 30 days of its notice to the petitioner the court receives no notice that the
256 petitioner elects to proceed pro se, the court shall dismiss any pending post-conviction actions
257 and vacate any execution stays, and the state may initiate proceedings under Section 77-19-9 to
258 issue an execution warrant.