

**EXONERATION AND INNOCENCE**

**ASSISTANCE**

2008 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Gregory S. Bell**

House Sponsor: Douglas C. Aagard

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**LONG TITLE**

**Committee Note:**

The Judiciary Interim Committee recommended this bill.

**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 the current reference term "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;



- 28           • right of the victims to attend the hearing; and
- 29           • appointment of pro bono counsel;
- 30           ▶ provides that a petitioner who is convicted of a felony and is imprisoned, and is then
- 31 found to be factually innocent, is entitled to financial assistance from the state for
- 32 the period of imprisonment;
- 33           ▶ provides that the financial assistance amount shall be the monetary equivalent of the
- 34 average annual wage for a single wage earner in Utah for each year of
- 35 imprisonment, for a maximum of 15 years of imprisonment; and
- 36           ▶ provides that a petitioner found to be factually innocent shall receive two years'
- 37 financial assistance in a lump sum, and the balance shall be paid out quarterly to the
- 38 person from the Commission on Criminal and Juvenile Justice beginning no later
- 39 than one year after the legislative appropriation of the funds is made and ending no
- 40 later than ten years after the appropriation is made.

**41 Monies Appropriated in this Bill:**

42           None

**43 Other Special Clauses:**

44           None

**45 Utah Code Sections Affected:**

46 AMENDS:

47           **78-35a-107**, as last amended by Laws of Utah 2004, Chapter 139

48           **78-35a-301**, as last amended by Laws of Utah 2007, Chapter 125

49           **78-35a-303**, as enacted by Laws of Utah 2001, Chapter 261

50 ENACTS:

51           **78-35a-300.5**, Utah Code Annotated 1953

52           **78-35a-401**, Utah Code Annotated 1953

53           **78-35a-402**, Utah Code Annotated 1953

54           **78-35a-403**, Utah Code Annotated 1953

55           **78-35a-404**, Utah Code Annotated 1953

56           **78-35a-405**, Utah Code Annotated 1953



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

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

60 **78-35a-107. Statute of limitations for postconviction relief.**

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

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

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

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

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

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

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

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

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

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

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

81 [~~4~~] (5) Sections 77-19-8, 78-12-35, and 78-12-40 do not extend the limitations period  
82 established in this section.

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

84 **Part 3. Postconviction DNA Testing**

85 **78-35a-300.5. Title.**

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

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

88 **78-35a-301. Postconviction testing of DNA -- Petition -- Sufficient allegations --**  
89 **Notification of victim.**

- 90 (1) As used in this part[;]:
- 91 (a) "DNA" means deoxyribonucleic acid.
- 92 (b) "Factually innocent" has the same definition as in Section 78-35a-402.
- 93 (2) A person convicted of a felony offense may at any time file a petition for
- 94 postconviction DNA testing in the trial court that entered the judgment of conviction [~~against~~
- 95 ~~him~~] if the person asserts [~~his actual~~] factual innocence under oath and the petition alleges:
- 96 (a) evidence has been obtained regarding the person's case which is still in existence
- 97 and is in a condition that allows DNA testing to be conducted;
- 98 (b) the chain of custody is sufficient to establish that the evidence has not been altered
- 99 in any material aspect;
- 100 (c) the person identifies the specific evidence to be tested and states a theory of
- 101 defense, not inconsistent with theories previously asserted at trial, that the requested DNA
- 102 testing would support;
- 103 (d) the evidence was not previously subjected to DNA testing, or if the evidence was
- 104 tested previously, the evidence was not subjected to the testing that is now requested, and the
- 105 new testing may resolve an issue not resolved by the prior testing;
- 106 (e) the proposed DNA testing is generally accepted as valid in the scientific field or is
- 107 otherwise admissible under Utah law;
- 108 (f) the evidence that is the subject of the request for testing has the potential to produce
- 109 new, noncumulative evidence that will establish the person's [~~actual~~] factual innocence; and
- 110 (g) the person is aware of the consequences of filing the petition, including:
- 111 (i) those specified in Sections 78-35a-302 and 78-35a-304; and
- 112 (ii) that the person is waiving any statute of limitations in all jurisdictions as to any
- 113 felony offense [~~he~~] the person has committed which is identified through DNA database
- 114 comparison.
- 115 (3) The petition under Subsection (2) shall [~~be in compliance~~] comply with Rule 65C,
- 116 Utah Rules of Civil Procedure, including providing the underlying criminal case number.
- 117 (4) The court may not order DNA testing in cases in which DNA testing was available
- 118 at the time of trial and the person did not request DNA testing or present DNA evidence for
- 119 tactical reasons.
- 120 (5) After a petition is filed under this section, prosecutors, law enforcement officers,

121 and crime laboratory personnel have a duty to cooperate in preserving evidence and in  
122 determining the sufficiency of the chain of custody of the evidence which may be subject to  
123 DNA testing.

124 (6) (a) A person who files a petition under this section shall serve notice upon the  
125 office of the prosecutor who obtained the conviction, and upon the [state] Utah attorney  
126 general. The attorney general shall, within 30 days after receipt of service of a copy of the  
127 petition, or within any additional period of time the court allows, answer or otherwise respond  
128 to all proceedings initiated under this part.

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

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

137 (b) If the court orders that the testing be conducted by any laboratory other than the  
138 state crime laboratory, the court shall require that the testing be performed:

139 (i) under reasonable conditions designed to protect the state's interests in the integrity  
140 of the evidence; and

141 (ii) according to accepted scientific standards and procedures.

142 (8) (a) DNA testing under this section shall be paid for from funds appropriated to the  
143 Department of Corrections under Subsection 53-10-407(4)(a) from the DNA Specimen  
144 Restricted Account created in Section 53-10-407 if:

145 (i) the court ordered the DNA testing under this section;

146 (ii) the Utah State Crime Laboratory within the Criminal Investigations and Technical  
147 Services Division has a conflict of interest or does not have the capability to perform the  
148 necessary testing; and

149 (iii) the petitioner who has filed for postconviction DNA testing under Section  
150 78-35a-201 is serving a sentence of imprisonment and is indigent.

151 (b) Under this Subsection (8), costs of DNA testing include those necessary to

152 transport the evidence, prepare samples for analysis, analyze the evidence, and prepare reports  
153 of findings.

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

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

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

162 **78-35a-303. Consequences of postconviction DNA testing when result is favorable**  
163 **to person -- Procedures.**

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

169 (b) The state may stipulate to the conviction being vacated, or may request a hearing  
170 and attempt to demonstrate through evidence and argument that, despite the DNA test results,  
171 the state possesses sufficient evidence of the person's guilt so that ~~he~~ the person is unable to  
172 demonstrate by clear and convincing evidence that ~~he~~ the person is ~~actually~~ factually  
173 innocent of one or more offenses of which ~~he~~ the person was convicted, and all the lesser  
174 included offenses related to those offenses.

175 (2) (a) (i) If the result of postconviction DNA testing is favorable to the person and the  
176 state opposes vacating the conviction, the court shall consider all the evidence presented at the  
177 original trial and at the hearing under Subsection (1)(b), including the new DNA test result.  
178 ~~[Evidence that would otherwise have been suppressed at criminal trial is admissible, unless the~~  
179 ~~evidence is an unconstitutionally coerced statement from the person.]~~

180 (ii) The court may consider:

181 (A) evidence that was suppressed or would be suppressed at a criminal trial; and

182 (B) hearsay evidence, and may consider that the evidence is hearsay in evaluating its

183 weight and credibility.

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

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

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

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

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

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

206 **78-35a-401. Title.**

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

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

209 **78-35a-402. Petition for determination of factual innocence -- Sufficient**  
210 **allegations -- Notification of victim.**

211 As used in this part:

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

213 (a) engage in the conduct for which the person was convicted;

214 (b) engage in conduct relating to any lesser included offenses; or  
215 (c) commit any other felony arising out of or reasonably connected to the facts  
216 supporting the indictment or information upon which the person was convicted.

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

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

223 (ii) the petitioner identifies the specific evidence the petitioner claims establishes  
224 innocence;

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

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

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

229 (vi) (A) neither the petitioner nor petitioner's counsel knew of the evidence at the time  
230 of trial or sentencing or in time to include the evidence in any previously filed post-trial motion  
231 or postconviction motion, and the evidence could not have been discovered by the petitioner or  
232 the petitioner's counsel through the exercise of reasonable diligence;

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

235 (C) the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in the  
236 interest of justice.

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

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

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

244 (5) After a petition is filed under this section, prosecutors, law enforcement officers,



245 and crime laboratory personnel shall cooperate in preserving evidence and in determining the  
246 sufficiency of the chain of custody of the evidence which is the subject of the petition.

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

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

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

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

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

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

264 **78-35a-403. Requests for appointment of counsel -- Appeals -- Postconviction**  
265 **petitions.**

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

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

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

271 **78-35a-404. Hearing upon petition -- Procedures -- Court determination of factual**  
272 **innocence.**

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

275 (b) The burden is upon the petitioner to establish the petitioner's factual innocence by

276 clear and convincing evidence.

277 (2) The court may consider:

278 (a) evidence that was suppressed or would be suppressed at a criminal trial; and

279 (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its

280 weight and credibility.

281 (3) In making its determination the court shall consider, in addition to the evidence

282 presented at the hearing under this part, all the evidence presented at the original trial and at

283 any postconviction proceedings in the case.

284 (4) If the court, after considering all the evidence, determines by clear and convincing  
285 evidence that the petitioner:

286 (a) is factually innocent of one or more offenses of which the petitioner was convicted,

287 the court shall order that those convictions:

288 (i) be vacated with prejudice; and

289 (ii) be expunged from the petitioner's record; or

290 (b) did not commit one or more offenses of which the petitioner was convicted, but the

291 court does not find by clear and convincing evidence that the petitioner did not commit any

292 lesser included offenses relating to those offenses, the court shall modify the original

293 conviction and sentence of the petitioner as appropriate for the lesser included offense, whether

294 or not the lesser included offense was originally submitted to the trier of fact.

295 (5) (a) If the court, after considering all the evidence, does not determine by clear and

296 convincing evidence that the petitioner is factually innocent of the offense or offenses the

297 petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny

298 the petition regarding the offense or offenses.

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

300 on the record, and the petitioner may not file a second or successive petition under this section

301 without first applying to and obtaining permission from the court which denied the prior

302 petition.

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

304 **78-35a-405. Judgment and assistance payment.**

305 (1) (a) If a court finds a petitioner factually innocent under Title 78, Chapter 35a, Part

306 3, Postconviction DNA Testing, or under this part, and if the petitioner has served a period of

307 incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall  
308 receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of  
309 15 years, the monetary equivalent of the average annual wage for a single wage earner in Utah  
310 for the year the petitioner was released from prison, as determined by the Department of  
311 Workforce Services.

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

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

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

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

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

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

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

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

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

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

337 (iii) be allocated so that the entire amount due to the petitioner under this section has

338 been paid no later than ten years after the effective date of the appropriation made under  
339 Subsection (2)(b).

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

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

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

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

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

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

361 (5) Payments pursuant to this section:

362 (a) are not subject to any Utah state taxes; and

363 (b) may not be offset by any expenses incurred by the state or any political subdivision  
364 of the state, including expenses incurred to secure the petitioner's custody, or to feed, clothe, or  
365 provide medical services for the petitioner.

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

368 (a) issue an order of expungement of the petitioner's criminal record for all acts in the

369 charging document upon which the payment under this part is based; and

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

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

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

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**Legislative Review Note**  
as of 10-29-07 10:34 AM

**Office of Legislative Research and General Counsel**

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**S.B. 16 - Exoneration and Innocence Assistance**

**Fiscal Note**

2008 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 2008</u> <u>Approp.</u>	<u>FY 2009</u> <u>Approp.</u>	<u>FY 2010</u> <u>Approp.</u>	<u>FY 2008</u> <u>Revenue</u>	<u>FY 2009</u> <u>Revenue</u>	<u>FY 2010</u> <u>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, measureable benefits for individuals, businesses, or local governments.