

1 **POSTCONVICTION REMEDIES ACT**

2 **AMENDMENTS**

3 2010 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: J. Stuart Adams**

6 House Sponsor: Rebecca D. Lockhart

7

8 **LONG TITLE**

9 **General Description:**

10 This bill clarifies the procedure for claiming factual innocence.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ clarifies the procedure for claiming factual innocence;
- 14 ▶ specifies particular steps required;
- 15 ▶ gives the court discretion to review and dismiss petitions under specific
- 16 circumstances; and
- 17 ▶ makes technical corrections.

18 **Monies Appropriated in this Bill:**

19 None

20 **Other Special Clauses:**

21 This bill provides an immediate effective date.

22 **Utah Code Sections Affected:**

23 AMENDS:

24 **78B-9-104**, as last amended by Laws of Utah 2008, Chapter 288 and renumbered and
25 amended by Laws of Utah 2008, Chapter 3

26 **78B-9-402**, as last amended by Laws of Utah 2009, Chapter 301

27 **78B-9-404**, as enacted by Laws of Utah 2008, Chapter 358

28 ENACTS:

29 **78B-9-401.5**, Utah Code Annotated 1953

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

Section 1. Section **78B-9-104** is amended to read:

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

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

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

(b) the conviction was obtained or the sentence was imposed under a statute that is in 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(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

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

(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

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

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

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

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

69 (3) The court may not grant relief from a conviction based on a claim that the
70 petitioner is innocent of the crime for which convicted except as provided in Title 78B,
71 Chapter 9, Part 3, Postconviction Testing of DNA , or Part 4, Postconviction Determination of
72 Factual Innocence. Claims under Part 3 or Part 4 of this chapter may not be filed as part of a
73 petition under this part, but shall be filed separately and in conformity with the provisions of
74 Part 3 or Part 4.

75 Section 2. Section **78B-9-401.5** is enacted to read:

76 **78B-9-401.5. Definitions.**

77 As used in this part:

78 (1) "Bona fide and compelling issue of factual innocence" means that the newly
79 discovered material evidence presented by the petitioner, if credible, would clearly establish
80 the factual innocence of the petitioner.

81 (2) "Factual innocence" or "factually innocent" means a person did not:

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

83 (b) engage in conduct relating to any lesser included offenses of the crime for which
84 the person was convicted; or

85 (c) commit any other felony arising out of or reasonably connected to the facts

86 supporting the indictment or information upon which the person was convicted.

87 (3) "Newly discovered material evidence" means evidence that was not available to the
88 petitioner at trial or during the resolution on the merits by the trial court of any motion to
89 withdraw a guilty plea or motion for new trial and which is relevant to the determination of the
90 issue of factual innocence, and may also include:

91 (a) evidence which was discovered prior to or in the course of any appeal or
92 postconviction proceedings that served in whole or in part as the basis for vacatur or reversal
93 of the conviction of petitioner; or

94 (b) evidence that supports the claims within a petition filed under Part 1, General
95 Provisions, which is pending at the time of the court's determination of factual innocence.

96 (4) "Period of incarceration" means any sentence of imprisonment, including jail,
97 which was served after judgement of conviction.

98 Section 3. Section **78B-9-402** is amended to read:

99 **78B-9-402. Petition for determination of factual innocence -- Sufficient**
100 **allegations -- Notification of victim.**

101 [~~As used in this part:~~]

102 [~~(1) "Factually innocent" means a person did not:~~]

103 [~~(a) engage in the conduct for which the person was convicted;~~]

104 [~~(b) engage in conduct relating to any lesser included offenses; or]~~

105 [~~(c) commit any other felony arising out of or reasonably connected to the facts~~
106 ~~supporting the indictment or information upon which the person was convicted.]~~

107 [~~(2)(a)~~] (1) A person who has been convicted of a felony offense may petition the
108 district court in the county in which the person was convicted for a hearing to establish that
109 the person is factually innocent of the crime or crimes of which the person was convicted[, if
110 the person asserts].

111 (2) (a) The petition shall contain an assertion of factual innocence under oath [and the
112 petition alleges] by the petitioner, and shall aver, with supporting affidavits or other credible
113 documents, that:

114 (i) newly discovered material evidence exists that, if credible, establishes that the
115 petitioner is factually innocent;

116 (ii) [~~the petitioner identifies~~] the specific evidence identified by the petitioner [~~claims~~]
117 in the petition establishes innocence;

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

119 (iv) the material evidence is not merely impeachment evidence; and

120 (v) viewed with all the other evidence, the newly discovered evidence demonstrates
121 that the petitioner is factually innocent[~~;~~ ~~and~~].

122 (b) The court shall review the petition in accordance with the procedures in Subsection
123 (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a).

124 If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall
125 dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the
126 attorney general.

127 (3) (a) The petition shall also contain an averment that:

128 [~~(vi)(A)~~] (i) neither the petitioner nor petitioner's counsel knew of the evidence at the
129 time of trial or sentencing or in time to include the evidence in any previously filed post-trial
130 motion or postconviction motion, and the evidence could not have been discovered by the
131 petitioner or the petitioner's counsel through the exercise of reasonable diligence; or

132 [~~(B)~~] (ii) a court has found ineffective assistance of counsel for failing to exercise
133 reasonable diligence in uncovering the evidence[~~;~~ ~~or~~].

134 [~~(C)~~ the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in
135 the interest of justice.]

136 (b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the
137 court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the
138 court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss
139 the petition without prejudice and give notice to the petitioner and the attorney general of the
140 dismissal, or the court may enter a finding that based upon the strength of the petition, the
141 requirements of Subsection (3)(a) are waived in the interest of justice.

142 (4) (a) If the conviction for which the petitioner asserts factual innocence was based
143 upon a plea of guilty, the petition shall contain the specific nature and content of the evidence
144 that establishes factual innocence. The court shall review the evidence and may dismiss the
145 petition at any time in the course of the proceedings, if the court finds that the evidence of
146 factual innocence relies solely upon the recantation of testimony or prior statements made by a
147 witness against the petitioner, and the recantation appears to the court to be equivocal or
148 self-serving.

149 ~~[(b)]~~ (5) A person who has already obtained postconviction relief that vacated or
150 reversed the person's conviction or sentence may also file a petition under this part in the same
151 manner and form as described above, if no retrial or appeal regarding this offense is pending.

152 ~~[(3)]~~ (6) If some or all of the evidence alleged to be exonerating is biological evidence
153 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

154 ~~[(4)]~~ (7) Except as provided in Subsection ~~[(6)]~~ (9), the petition shall be in compliance
155 with and governed by Rule 65C, Utah Rules of Civil Procedure, and shall include the
156 underlying criminal case number.

157 ~~[(5)]~~ (8) After a petition is filed under this section, prosecutors, law enforcement
158 officers, and crime laboratory personnel shall cooperate in preserving evidence and in
159 determining the sufficiency of the chain of custody of the evidence which is the subject of the
160 petition.

161 ~~[(6) (a) Notwithstanding paragraphs (g) and (h) of Rule 65C, Utah Rules of Civil~~
162 ~~Procedure, a]~~

163 (9) (a) A person who files a petition under this section shall serve notice of the petition
164 and a copy of the petition upon the office of the prosecutor who obtained the conviction and
165 upon the Utah attorney general.

166 (b) The assigned judge shall conduct an initial review of the petition. If it is apparent
167 to the court that the petitioner is either merely relitigating facts, issues, or evidence presented
168 in previous proceedings or presenting issues that appear frivolous or speculative on their face,
169 the court shall dismiss the petition, state the basis for the dismissal, and serve notice of

170 dismissal upon the petitioner and the attorney general. If, upon completion of the initial
171 review, the court does not dismiss the petition, it shall order the attorney general to file a
172 response to the petition. The attorney general shall, within 30 days after receipt of [~~service of~~
173 ~~the notice~~] the court's order, or within any additional period of time the court allows, answer or
174 otherwise respond to all proceedings initiated under this part.

175 [~~(b)~~(i)] (c) After the time for response by the attorney general under Subsection
176 [~~(6)~~(a)] (9)(b) has passed, the court shall order a hearing if it finds the petition meets the
177 requirements of Subsections (2) and (3) and finds there is a bona fide [issue as to whether the
178 petitioner is factually innocent of] and compelling issue of factual innocence regarding the
179 charges of which the petitioner was convicted. No bona fide and compelling issue of factual
180 innocence exists if the petitioner is merely relitigating facts, issues, or evidence presented in a
181 previous proceeding or if the petitioner is unable to identify with sufficient specificity the
182 nature and reliability of the newly discovered evidence that establishes the petitioner's factual
183 innocence.

184 [(i)] (d) If the parties stipulate that the evidence establishes that the petitioner is
185 factually innocent, the court may find the petitioner is factually innocent without holding a
186 hearing.

187 [~~(7)~~] (10) The court may not grant a petition for a hearing under this part during the
188 period in which criminal proceedings in the matter are pending before any trial or appellate
189 court, unless stipulated to by the parties.

190 [(8)] (11) Any victim of a crime that is the subject of a petition under this part, and
191 who has elected to receive notice under Section 77-38-3, shall be notified by the state's
192 attorney of any hearing regarding the petition.

193 (12) A petition to determine factual innocence under this part, or Part 3,
194 Postconviction Testing of DNA, shall be filed separately from any petition for postconviction
195 relief under Part 1, General Provisions. Separate petitions may be filed simultaneously in the
196 same court.

197 (13) The procedures governing the filing and adjudication of a petition to determine

198 factual innocence apply to all petitions currently filed or pending and any new petitions filed
199 on or after the effective date of this amendment.

200 Section 4. Section **78B-9-404** is amended to read:

201 **78B-9-404. Hearing upon petition -- Procedures -- Court determination of**
202 **factual innocence.**

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

205 (b) The burden is upon the petitioner to establish the petitioner's factual innocence by
206 clear and convincing evidence.

207 (2) The court may consider:

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

209 (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its
210 weight and credibility.

211 (3) In making its determination the court shall consider, in addition to the evidence
212 presented at the hearing under this part, [~~all the evidence presented at the original trial~~] the
213 record of the original criminal case and at any postconviction proceedings in the case.

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

216 (a) is factually innocent of one or more offenses of which the petitioner was convicted,
217 the court shall order that those convictions:

218 (i) be vacated with prejudice; and

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

220 (b) did not commit one or more offenses of which the petitioner was convicted, but the
221 court does not find by clear and convincing evidence that the petitioner did not commit any
222 lesser included offenses relating to those offenses, the court shall modify the original
223 conviction and sentence of the petitioner as appropriate for the lesser included offense,
224 whether or not the lesser included offense was originally submitted to the trier of fact.

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

226 convincing evidence that the petitioner is factually innocent of the offense or offenses the
227 petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny
228 the petition regarding the offense or offenses.

229 (b) If the court finds that the petition was brought in bad faith, it shall enter the
230 finding on the record, and the petitioner may not file a second or successive petition under this
231 section without first applying to and obtaining permission from the court which denied the
232 prior petition.

233 (6) At least 30 days prior to a hearing on a petition to determine factual innocence, the
234 petitioner and the respondent shall exchange information regarding the evidence each intends
235 to present at the hearing. This information shall include:

236 (a) a list of witnesses to be called at the hearing; and

237 (b) a summary of the testimony or other evidence to be introduced through each
238 witness, including any expert witnesses.

239 (7) Each party is entitled to a copy of any expert report to be introduced or relied upon
240 by that expert or another expert at least 30 days prior to hearing.

241 **Section 5. Effective date.**

242 If approved by two-thirds of all the members elected to each house, this bill takes effect
243 upon approval by the governor, or the day following the constitutional time limit of Utah
244 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
245 the date of veto override.