

**FACTUAL INNOCENCE AMENDMENTS**

2012 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Brad L. Dee**

Senate Sponsor: Todd Weiler

---

---

**LONG TITLE**

**General Description:**

This bill makes clarifying amendments to factual innocence provisions.

**Highlighted Provisions:**

This bill:

- ▶ clarifies the requirement of a hearing if the state does not stipulate to factual innocence;
- ▶ clarifies that all proceedings are governed by Utah Rules of Civil Procedure, Rule 65C;
- ▶ sets a standard for the court's determination of factual innocence;
- ▶ disallows prejudgment interest on payments made to a person after a finding of factual innocence; and
- ▶ provides that ~~H→~~ **assistance payments on** ~~←H~~ a claim of factual innocence

~~H→~~ [is] are ~~←H~~ extinguished upon the death of the petitioner.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**78B-9-402**, as last amended by Laws of Utah 2010, Chapter 153



59 diligence in uncovering the evidence.

60 (b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the  
 61 court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the  
 62 court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss  
 63 the petition without prejudice and give notice to the petitioner and the attorney general of the  
 64 dismissal, or the court may ~~H→ [enter a finding that based upon the strength of the petition, the~~  
 65 ~~requirements of Subsection (3)(a) are waived in the interest of justice] waive the requirements of~~  
 65a Subsection (3)(a) if the court finds the petition should proceed to hearing based upon the  
 65b strength of the petition, and that there is other evidence that could have been discovered  
 65c through the exercise of reasonable diligence by petitioner or petitioner's counsel at trial, and  
 65d the other evidence:

65e (i) was not discovered by petitioner or petitioner's counsel;

65f (ii) is material upon the issue of factual innocence; and

65g (iii) has never been presented to a court ←H .

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

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

75 (6) If some or all of the evidence alleged to be exonerating is biological evidence  
 76 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

77 (7) Except as provided in Subsection (9), the petition and all subsequent proceedings  
 78 shall be in compliance with and governed by Rule 65C, Utah Rules of Civil Procedure, and  
 79 shall include the underlying criminal case number.

80 (8) After a petition is filed under this section, prosecutors, law enforcement officers,  
 81 and crime laboratory personnel shall cooperate in preserving evidence and in determining the  
 82 sufficiency of the chain of custody of the evidence which is the subject of the petition.

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

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

90 upon the petitioner and the attorney general. If, upon completion of the initial review, the court  
 91 does not dismiss the petition, it shall order the attorney general to file a response to the petition.  
 92 The attorney general shall, within 30 days after receipt of the court's order, or within any  
 93 additional period of time the court allows, answer or otherwise respond to all proceedings  
 94 initiated under this part.

95 (c) After the time for response by the attorney general under Subsection (9)(b) has  
 96 passed, the court shall order a hearing if it finds the petition meets the requirements of  
 97 Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual innocence  
 98 regarding the charges of which the petitioner was convicted. No bona fide and compelling  
 99 issue of factual innocence exists if the petitioner is merely relitigating facts, issues, or evidence  
 100 presented in a previous proceeding or if the petitioner is unable to identify with sufficient  
 101 specificity the nature and reliability of the newly discovered evidence that establishes the  
 102 petitioner's factual innocence.

103 (d) If the parties stipulate that the evidence establishes that the petitioner is factually  
 104 innocent, the court may find the petitioner is factually innocent without holding a hearing. If  
 105 the state will not stipulate that the evidence establishes that the petitioner is factually innocent,  
 106 no determination of factual innocence may be made by the court without first holding a hearing  
 107 under this part.

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

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

114 (12) A petition to determine factual innocence under this part, or Part 3, Postconviction  
 115 Testing of DNA, shall be filed separately from any petition for postconviction relief under Part  
 116 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

117 (13) The procedures governing the filing and adjudication of a petition to determine  
 118 factual innocence apply to all petitions currently filed or pending ~~in the district court~~ and  
 118a any new petitions filed on  
 119 or after ~~[the effective date of this amendment]~~ ~~in the district court~~ **June 1, 2012** .

120 (14) A claim for determination of factual innocence under this part is ~~not~~  
 120a extinguished

121 upon the death of the petitioner. ~~Ĥ~~→ The assistance payment provisions of Section 78B-9-405  
121a may not apply, and financial payments may not be made, if the finding of factual innocence  
121b occurs after the death of the petitioner. In addition, any payments already being made under  
121c Section 78B-9-405 shall cease upon the death of the petitioner. ←Ĥ

122 Section 2. Section 78B-9-404 is amended to read:

123 **78B-9-404. Hearing upon petition -- Procedures -- Court determination of factual**  
124 **innocence.**

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

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

129 (2) The court may consider:

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

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

133 (3) In making its determination the court shall consider, in addition to the evidence  
134 presented at the hearing under this part, the record of the original criminal case and at any  
135 postconviction proceedings in the case.

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

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

140 (i) be vacated with prejudice; and

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

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

147 (5) (a) If the court, after considering all the evidence, does not determine by clear and  
148 convincing evidence that the petitioner is factually innocent of the offense or offenses the  
149 petitioner is challenging and does not find that Subsection (4)(b) applies, the court shall deny  
150 the petition regarding the offense or offenses.

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

152 on the record, and the petitioner may not file a second or successive petition under this section  
 153 without first applying to and obtaining permission from the court which denied the prior  
 154 petition.

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

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

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

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

163 (8) The court, after considering all the evidence, may not find the petitioner to be  
 164 factually innocent unless:

165 (a) the court determines by clear and convincing evidence that the petitioner did not  
 166 commit one or more of the offenses of which the petitioner was convicted, as defined in  
 167 Subsection 78B-9-401.5(2); and

168 (b) the determination is based upon the newly discovered material evidence described  
 169 in the petition, pursuant to Subsection 78B-9-402 ~~H~~→ [(2)(a)] ←~~H~~, and as defined in Subsection  
 170 78B-9-401.5(3).

171 Section 3. Section **78B-9-405** is amended to read:

172 **78B-9-405. Judgment and assistance payment.**

173 (1) (a) If a court finds a petitioner factually innocent under [~~Title 78B, Chapter 9,~~] Part  
 174 3, Postconviction Testing of DNA, or under this part, and if the petitioner has served a period  
 175 of incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall  
 176 receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of  
 177 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah,  
 178 as determined by the data most recently published by the Department of Workforce Services at  
 179 the time of the petitioner's release from prison.

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