

**POSTCONVICTION REMEDIES AMENDMENTS**

2020 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Brady Brammer**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill modifies the Postconviction Remedies Act.

**Highlighted Provisions:**

This bill:

- ▶ adds a lower standard for a petitioner to show prejudice when a prosecutor knowingly failed to correct false testimony;
- ▶ modifies the circumstances under which a post-conviction petition may be precluded;
- ▶ provides that post-conviction remedies petitions based on factual innocence or requesting DNA testing are not subject to procedural or time bars;
- ▶ modifies the factors that a judge may consider when determining whether to appoint pro bono counsel;
- ▶ modifies the timeline for when a court provides certain notices to an individual who is sentenced to death and whose sentence has been affirmed;
- ▶ modifies the circumstances under which a petitioner who is sentenced to death and whose sentence has been affirmed may decline appointment of counsel;
- ▶ eliminates the time requirement in which a court shall appoint counsel before requiring a petitioner who is sentenced to death and whose sentence has been affirmed to proceed without counsel or dismissing the petitioner's postconviction action; and



28           ▶ makes technical and conforming changes.

29 **Money Appropriated in this Bill:**

30           None

31 **Other Special Clauses:**

32           None

33 **Utah Code Sections Affected:**

34 AMENDS:

35           **78B-9-104**, as last amended by Laws of Utah 2018, Chapter 221

36           **78B-9-106**, as last amended by Laws of Utah 2017, Chapter 447

37           **78B-9-107**, as last amended by Laws of Utah 2017, Chapter 447

38           **78B-9-109**, as last amended by Laws of Utah 2008, Chapter 288 and renumbered and  
39 amended by Laws of Utah 2008, Chapter 3

40           **78B-9-202**, as last amended by Laws of Utah 2011, Chapter 165

41           **78B-9-301**, as last amended by Laws of Utah 2018, Chapter 86

42           **78B-9-402**, as last amended by Laws of Utah 2013, Chapter 46



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

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

46           **78B-9-104. Grounds for relief -- Retroactivity of rule.**

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

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

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

56           (c) the sentence was imposed or probation was revoked in violation of the controlling  
57 statutory provisions;

58           (d) the petitioner had ineffective assistance of counsel in violation of the United States

59 Constitution or Utah Constitution;

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

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

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

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

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

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

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

76 (ii) the rule decriminalizes the conduct that comprises the elements of the crime for  
77 which the petitioner was convicted; or

78 (g) the petitioner committed any of the following offenses while subject to force, fraud,  
79 or coercion, as defined in Section 76-5-308:

80 (i) Section 58-37-8, possession of a controlled substance;

81 (ii) Section 76-10-1304, aiding prostitution;

82 (iii) Section 76-6-206, criminal trespass;

83 (iv) Section 76-6-413, theft;

84 (v) Section 76-6-502, possession of forged writing or device for writing;

85 (vi) Sections 76-6-602 through 76-6-608, retail theft;

86 (vii) Subsection 76-6-1105(2)(a)(i)(A), unlawful possession of another's identification  
87 document;

88 (viii) Section 76-9-702, lewdness;

89 (ix) Section 76-10-1302, prostitution; or

90 (x) Section ~~76-10-1313~~, sexual solicitation.

91 (2) The court may not grant relief from a conviction or sentence unless in light of the  
92 facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced  
93 at trial or during sentencing:

94 (a) the petitioner establishes that there would be a reasonable likelihood of a more  
95 favorable outcome [~~in light of the facts proved in the post-conviction proceeding, viewed with~~  
96 ~~the evidence and facts introduced at trial or during sentencing.]; or~~

97 (b) if the petitioner challenges the conviction or the sentence on grounds that the  
98 prosecutor knowingly failed to correct false testimony at trial or sentencing, the petitioner  
99 establishes that the false testimony, in any reasonable likelihood, could have affected the  
100 judgment of the fact finder.

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

105 (b) Claims under Part 3, Postconviction Testing of DNA or Part 4, Postconviction  
106 Determination of Factual Innocence of this chapter may not be filed as part of a petition under  
107 this part, but shall be filed separately and in conformity with the provisions of Part 3,  
108 Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence.

109 Section 2. Section ~~78B-9-106~~ is amended to read:

110 **~~78B-9-106. Preclusion of relief -- Exception.~~**

111 (1) A [~~person~~] petitioner is not eligible for relief under this chapter upon any ground  
112 that:

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

114 (b) was raised or addressed in the trial court, at trial, or on appeal;

115 (c) could have been but was not raised in the trial court, at trial, or on appeal;

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

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

119 (2) (a) The state may raise any of the procedural bars or time bar at any time, including  
120 during [~~the state's~~] an appeal from an order granting or denying post-conviction relief, unless

121 the court determines that the state should have raised the time bar or procedural bar at an earlier  
122 time.

123 (b) Any court may raise a procedural bar or time bar on [~~its~~] the court's own motion,  
124 provided that [~~it~~] the court gives the parties notice and an opportunity to be heard.

125 (3) (a) Notwithstanding Subsection (1)(c), a [~~person~~] petitioner may be eligible for  
126 relief on a basis that the ground could have been but was not raised in the trial court, at trial, or  
127 on appeal, if the failure to raise that ground was due to ineffective assistance of counsel; or

128 (b) Notwithstanding Subsections (1)(c) and (1)(d), a [~~person~~] petitioner may be eligible  
129 for relief on a basis that the ground could have been but was not raised in the trial court, at trial,  
130 on appeal, or in a previous request for post-conviction relief, if the failure to raise that ground  
131 was due to force, fraud, or coercion as defined in Section [76-5-308](#).

132 (4) This section authorizes a merits review only to the extent required to address the  
133 exception set forth in Subsection (3).

134 (5) This section does not apply to a petition filed under Part 3, Postconviction Testing  
135 of DNA, or Part 4, Postconviction Determination of Factual Innocence.

136 Section 3. Section **78B-9-107** is amended to read:

137 **78B-9-107. Statute of limitations for postconviction relief -- Exception.**

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

140 (2) For purposes of this section, the cause of action accrues on the [~~latest~~] later of the  
141 following dates:

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

144 (b) the entry of the decision of the appellate court [~~which~~] that has jurisdiction over the  
145 case, if an appeal is taken;

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

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

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

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

154 (3) (a) The limitations period is tolled for any period during which the petitioner was  
155 prevented from filing a petition due to state action in violation of the United States  
156 Constitution, due to physical or mental incapacity, or for claims arising under Subsection  
157 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308.

158 (b) The petitioner has the burden of proving by a preponderance of the evidence that  
159 the petitioner is entitled to relief under this Subsection (3).

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

162 (a) exoneration through DNA testing under Section 78B-9-303; or

163 (b) factual innocence under Section ~~[78B-9-401]~~ 78B-9-402.

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

166 (6) This section does not apply to a petition filed under Part 3, Postconviction Testing  
167 of DNA, or Part 4, Postconviction Determination of Factual Innocence.

168 Section 4. Section 78B-9-109 is amended to read:

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

170 (1) (a) If any portion of the petition is not summarily dismissed, the court may, upon  
171 the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the  
172 petitioner in the post-conviction court or on post-conviction appeal.

173 (b) Counsel who represented the petitioner at trial or on the direct appeal may not be  
174 appointed to represent the petitioner under this section.

175 (2) In determining whether to appoint counsel, the court ~~[shall]~~ may consider the  
176 following 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 (a) whether the petitioner is incarcerated;

182 (b) the likelihood that an evidentiary hearing will be necessary;

- 183 (c) the likelihood that an investigation will be necessary;  
184 (d) the complexity of the factual and legal issues;  
185 (e) the apparent capacity of the petitioner to litigate the case; and  
186 (f) any other factor relevant to the particular case.

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

189 Section 5. Section **78B-9-202** is amended to read:

190 **78B-9-202. Appointment and payment of counsel in death penalty cases.**

191 (1) ~~[A person]~~ An individual who has been sentenced to death and whose conviction  
192 and sentence has been affirmed on appeal shall be advised in open court, on the record, in a  
193 hearing ~~[scheduled no less than 30 days prior to the signing of the death warrant]~~ held as soon  
194 as reasonably practicable after remittitur from the supreme court, of the provisions of this  
195 chapter allowing challenges to the conviction and death sentence and the appointment of  
196 counsel for indigent petitioners.

197 (2) (a) (i) If a petitioner requests the court to appoint counsel, the court shall determine  
198 whether the petitioner is indigent and make findings on the record regarding the petitioner's  
199 indigency.

200 (ii) If the court finds that the petitioner is indigent, ~~[it shall, subject to the provisions of~~  
201 ~~Subsection (5);]~~ the court shall promptly appoint counsel who is qualified to represent  
202 petitioners in ~~[postconviction]~~ post-conviction death penalty cases as required by Rule 8 of the  
203 Utah Rules of Criminal Procedure.

204 (iii) Counsel who represented the petitioner at trial or on the direct appeal may not be  
205 appointed to represent the petitioner under this section.

206 (b) A petitioner who wishes to reject the offer of counsel shall be advised on the record  
207 by the court of the consequences of the rejection, and the court shall make detailed findings  
208 that the petitioner is competent to knowingly and voluntarily waive counsel, before the court  
209 may accept the rejection.

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

214           ~~[(a)]~~ (b) In determining whether the requested funds are reasonable, the court should  
215 consider:

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

219           (ii) whether the petitioner has established that the requested funds are necessary to  
220 develop evidence and legal arguments that are reasonably likely to support [~~postconviction~~]  
221 post-conviction relief.

222           ~~[(b)]~~ (c) (i) The court may authorize payment of attorney fees at a rate of \$125 per hour  
223 up to a maximum of \$60,000.

224           (ii) The court may exceed the maximum only upon a showing of good cause as  
225 established in Subsections [~~(3)(e) and (f)]~~ (3)(f) and (g).

226           ~~[(c)]~~ (d) (i) The court may authorize litigation expenses up to a maximum of \$20,000.

227           (ii) The court may exceed the maximum only upon a showing of good cause as  
228 established in Subsections [~~(3)(e) and (f)]~~ (3)(f) and (g).

229           ~~[(d)]~~ (e) (i) The court may authorize the petitioner to apply ex parte for the funds  
230 permitted in Subsections [~~(3)(b) and (c)]~~ (3)(c) and (d) upon a motion to proceed ex parte and  
231 if the petitioner establishes the need for confidentiality.

232           (ii) The motion to proceed ex parte must be served on counsel representing the state,  
233 and the court may not grant the motion without giving the state an opportunity to respond.

234           ~~[(e)]~~ (f) In determining whether good cause exists to exceed the maximum sums  
235 established in Subsections [~~(3)(b) and (c)]~~ (3)(c) and (d), the court shall consider:

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

239           (ii) whether the petitioner has established that the work done to date and the further  
240 work identified is reasonably likely to develop evidence or legal arguments that will support  
241 [~~postconviction~~] post-conviction relief.

242           ~~[(f)]~~ (g) The court may permit payment in excess of the maximum amounts established  
243 in Subsections [~~(3)(b) and (c)]~~ (3)(c) and (d) only on the petitioner's motion, provided that:

244           (i) (A) if the court has granted a motion to file ex parte applications under Subsection



245 (3)~~[(d)]~~(e), the petitioner shall serve the motion to exceed the maximum amounts on an  
 246 assistant attorney general employed in a division other than the one in which the attorney is  
 247 employed who represents the state in the [~~postconviction~~] post-conviction case; or

248 (B) if the court has not granted a motion to file ex parte applications, [~~then~~] the  
 249 petitioner must serve the attorney representing the state in the [~~postconviction matter~~]  
 250 post-conviction case with the motion to exceed the maximum funds;

251 (ii) if the motion proceeds under Subsection (3)~~[(f)]~~(e)(i), the designated assistant  
 252 attorney general may not disclose to the attorney representing the state in the [~~postconviction~~  
 253 ~~matter~~] post-conviction case any material the petitioner provides in support of the motion  
 254 except upon a determination by the court that the material is not protected by or that the  
 255 petitioner has waived the attorney client privilege or work product doctrine; and

256 (iii) the court gives the state an opportunity to respond to the request for funds in  
 257 excess of the maximum amounts provided in Subsections [~~(3)(b) and (c)~~] (3)(c) and (d).

258 (4) Nothing in this chapter shall be construed as creating the right to the effective  
 259 assistance of [~~postconviction~~] post-conviction counsel, and relief may not be granted on any  
 260 claim that [~~postconviction~~] post-conviction counsel was ineffective.

261 [~~(5) If within 60 days of the request for counsel the court cannot find counsel willing to~~  
 262 ~~accept the appointment, the court shall notify the petitioner and the state's counsel in writing.~~  
 263 ~~In that event, the petitioner may elect to proceed pro se by serving written notice of that~~  
 264 ~~election on the court and state's counsel within 30 days of the court's notice that no counsel~~  
 265 ~~could be found. If within 30 days of its notice to the petitioner the court receives no notice that~~  
 266 ~~the petitioner elects to proceed pro se, the court shall dismiss any pending postconviction~~  
 267 ~~actions and vacate any execution stays, and the state may initiate proceedings under Section~~  
 268 ~~77-19-9 to issue an execution warrant.]~~

269 [~~(6)~~] (5) (a) Subject to Subsection (2)(a) the court shall appoint counsel to represent the  
 270 petitioner for the first petition filed after the direct appeal.

271 (b) For all other petitions, counsel may not be appointed at public expense for a  
 272 petitioner, except to raise claims:

273 [~~(a)~~] (i) based on newly discovered evidence as defined in Subsection  
 274 78B-9-104(1)(e)(i); or

275 [~~(b)~~] (ii) based on Subsection 78B-9-104(1)(f) that could not have been raised in any

276 previously filed post trial motion or [~~postconviction~~] post-conviction proceeding.

277 Section 6. Section **78B-9-301** is amended to read:

278 **78B-9-301. Postconviction testing of DNA -- Petition -- Sufficient allegations --**

279 **Notification of victim.**

280 (1) As used in this part:

281 (a) "DNA" means deoxyribonucleic acid.

282 (b) "Factually innocent" means the same as that term is defined in Section [~~78B-9-402~~]

283 [78B-9-401.5](#).

284 (2) A person convicted of a felony offense may at any time file a petition for  
285 postconviction DNA testing in the trial court that entered the judgment of conviction if the  
286 person asserts factual innocence under oath and the petition alleges:

287 (a) evidence has been obtained regarding the person's case that is still in existence and  
288 is in a condition that allows DNA testing to be conducted;

289 (b) the chain of custody is sufficient to establish that the evidence has not been altered  
290 in any material aspect;

291 (c) the person identifies the specific evidence to be tested and states a theory of  
292 defense, not inconsistent with theories previously asserted at trial, that the requested DNA  
293 testing would support;

294 (d) the evidence was not previously subjected to DNA testing, or if the evidence was  
295 tested previously, the evidence was not subjected to the testing that is now requested, and the  
296 new testing may resolve an issue not resolved by the prior testing;

297 (e) the proposed DNA testing is generally accepted as valid in the scientific field or is  
298 otherwise admissible under Utah law;

299 (f) the evidence that is the subject of the request for testing:

300 (i) has the potential to produce new, noncumulative evidence; and

301 (ii) there is a reasonable probability that the defendant would not have been convicted  
302 or would have received a lesser sentence if the evidence had been presented at the original trial;  
303 and

304 (g) the person is aware of the consequences of filing the petition, including:

305 (i) those specified in Sections [78B-9-302](#) and [78B-9-304](#); and

306 (ii) that the person is waiving any statute of limitations in all jurisdictions as to any

307 felony offense the person has committed which is identified through DNA database  
308 comparison.

309 (3) The petition under Subsection (2) shall comply with Rule 65C, Utah Rules of Civil  
310 Procedure, including providing the underlying criminal case number.

311 (4) After a petition is filed under this section, prosecutors, law enforcement officers,  
312 and crime laboratory personnel have a duty to cooperate in preserving evidence and in  
313 determining the sufficiency of the chain of custody of the evidence which may be subject to  
314 DNA testing.

315 (5) (a) (i) A person who files a petition under this section shall serve notice upon the  
316 office of the prosecutor who obtained the conviction, and upon the Utah attorney general.

317 (ii) The attorney general shall, within 30 days after receipt of service of a copy of the  
318 petition, or within any additional period of time the court allows, answer or otherwise respond  
319 to all proceedings initiated under this part.

320 (b) After the attorney general responds under Subsection (5)(a), the petitioner has the  
321 right to reply to the response of the attorney general.

322 (c) After the attorney general and the petitioner have filed a response and reply in  
323 compliance with Subsection (5)(b), the court shall order DNA testing if it finds by a  
324 preponderance of the evidence that all criteria of Subsection (2) have been met.

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

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

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

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

335 (7) (a) DNA testing under this section shall be paid for from funds appropriated to the  
336 Department of Public Safety under Subsection 53-10-407(4)(d)(ii) from the DNA Specimen  
337 Restricted Account created in Section 53-10-407 if:

- 338 (i) the court ordered the DNA testing under this section;
- 339 (ii) the Utah State Crime Laboratory within the Criminal Investigations and Technical
- 340 Services Division has a conflict of interest or does not have the capability to perform the
- 341 necessary testing; and
- 342 (iii) the petitioner who has filed for postconviction DNA testing under Section
- 343 78B-9-201 is serving a sentence of imprisonment and is indigent.

344 (b) Under this Subsection (7), costs of DNA testing include those necessary to

345 transport the evidence, prepare samples for analysis, analyze the evidence, and prepare reports

346 of findings.

347 (8) If the person is serving a sentence of imprisonment and is indigent, the state shall

348 pay for the costs of the testing under this part, but if the result is not favorable to the person the

349 court may order the person to reimburse the state for the costs of the testing, pursuant to

350 Subsections 78B-9-302(4) and 78B-9-304(1)(b).

351 (9) Any victim of the crime regarding which the person petitions for DNA testing, who

352 has elected to receive notice under Section 77-38-3 shall be notified by the state's attorney of

353 any hearing regarding the petition and testing, even though the hearing is a civil proceeding.

354 Section 7. Section 78B-9-402 is amended to read:

355 **78B-9-402. Petition for determination of factual innocence -- Sufficient**

356 **allegations -- Notification of victim -- Payment to surviving spouse.**

357 (1) A person who has been convicted of a felony offense may petition the district court

358 in the county in which the person was convicted for a hearing to establish that the person is

359 factually innocent of the crime or crimes of which the person was convicted.

360 (2) (a) The petition shall contain an assertion of factual innocence under oath by the

361 petitioner and shall aver, with supporting affidavits or other credible documents, that:

- 362 (i) newly discovered material evidence exists that, if credible, establishes that the
- 363 petitioner is factually innocent;
- 364 (ii) the specific evidence identified by the petitioner in the petition establishes
- 365 innocence;
- 366 (iii) the material evidence is not merely cumulative of evidence that was known;
- 367 (iv) the material evidence is not merely impeachment evidence; and
- 368 (v) viewed with all the other evidence, the newly discovered evidence demonstrates

369 that the petitioner is factually innocent.

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

373 (ii) If the court finds the petition does not meet all the requirements of Subsection  
374 (2)(a), ~~[it]~~ the court shall dismiss the petition without prejudice and send notice of the dismissal  
375 to the petitioner and the attorney general.

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

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

381 (ii) a court has found ineffective assistance of counsel for failing to exercise reasonable  
382 diligence in uncovering the evidence.

383 (b) (i) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the  
384 court shall then review the petition to determine if Subsection (3)(a) has been satisfied.

385 (ii) If the court finds that the requirements of Subsection (3)(a) have not been satisfied,  
386 ~~[it]~~ the court may dismiss the petition without prejudice and give notice to the petitioner and  
387 the attorney general of the dismissal, or the court may waive the requirements of Subsection  
388 (3)(a) if the court finds the petition should proceed to hearing based upon the strength of the  
389 petition, and that there is other evidence that could have been discovered through the exercise  
390 of reasonable diligence by the petitioner or the petitioner's counsel at trial, and the other  
391 evidence:

392 ~~[(i)]~~ (A) was not discovered by the petitioner or the petitioner's counsel;

393 ~~[(ii)]~~ (B) is material upon the issue of factual innocence; and

394 ~~[(iii)]~~ (C) has never been presented to a court.

395 (4) (a) If the conviction for which the petitioner asserts factual innocence was based  
396 upon a plea of guilty, the petition shall contain the specific nature and content of the evidence  
397 that establishes factual innocence.

398 (b) The court shall review the evidence and may dismiss the petition at any time in the  
399 course of the proceedings, if the court finds that the evidence of factual innocence relies solely

400 upon the recantation of testimony or prior statements made by a witness against the petitioner,  
401 and the recantation appears to the court to be equivocal or self-serving.

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

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

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

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

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

416 (b) (i) The assigned judge shall conduct an initial review of the petition.

417 (ii) If it is apparent to the court that the petitioner is either merely relitigating facts,  
418 issues, or evidence presented in previous proceedings or presenting issues that appear frivolous  
419 or speculative on their face, the court shall dismiss the petition, state the basis for the dismissal,  
420 and serve notice of dismissal upon the petitioner and the attorney general.

421 (iii) If, upon completion of the initial review, the court does not dismiss the petition, it  
422 shall order the attorney general to file a response to the petition.

423 (iv) The attorney general shall, within 30 days after ~~receipt of~~ the day on which the  
424 attorney general receives the court's order, or within any additional period of time the court  
425 allows, answer or otherwise respond to all proceedings initiated under this part.

426 (c) (i) After the time for response by the attorney general under Subsection (9)(b) has  
427 passed, the court shall order a hearing if ~~it~~ the court finds the petition meets the requirements  
428 of Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual  
429 innocence regarding the charges of which the petitioner was convicted.

430 (ii) No bona fide and compelling issue of factual innocence exists if the petitioner is

431 merely relitigating facts, issues, or evidence presented in a previous proceeding or if the  
432 petitioner is unable to identify with sufficient specificity the nature and reliability of the newly  
433 discovered evidence that establishes the petitioner's factual innocence.

434 (d) (i) If the parties stipulate that the evidence establishes that the petitioner is factually  
435 innocent, the court may find the petitioner is factually innocent without holding a hearing.

436 (ii) If the state will not stipulate that the evidence establishes that the petitioner is  
437 factually innocent, no determination of factual innocence may be made by the court without  
438 first holding a hearing under this part.

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

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

445 (12) (a) A petition to determine factual innocence under this part, or Part 3,  
446 Postconviction Testing of DNA, shall be filed separately from any petition for postconviction  
447 relief under Part 1, General Provisions.

448 (b) Separate petitions may be filed simultaneously in the same court.

449 (13) The procedures governing the filing and adjudication of a petition to determine  
450 factual innocence apply to all petitions currently filed or pending in the district court and any  
451 new petitions filed on or after June 1, 2012.

452 (14) (a) As used in this Subsection (14) and in Subsection (15):

453 (i) "Married" means the legal marital relationship established between [~~a man and a~~  
454 ~~woman and~~] two individuals as recognized by the [~~laws of this state, and~~] law.

455 (ii) "Spouse" means [~~a person~~] an individual married to the petitioner at the time the  
456 petitioner was found guilty of the offense regarding which a petition is filed and who has since  
457 then been continuously married to the petitioner until the petitioner's death.

458 (b) A claim for determination of factual innocence under this part is not extinguished  
459 upon the death of the petitioner.

460 (c) (i) If any payments are already being made to the petitioner under this part at the  
461 time of the death of the petitioner, or if the finding of factual innocence occurs after the death

462 of the petitioner, the payments due under Section 78B-9-405 shall be paid according to the  
463 schedule under Section 78B-9-405 to the petitioner's surviving spouse.

464 (ii) Payments cease upon the death of the spouse.

465 (15) The spouse under Subsection (14) forfeits all rights to receive any payment under  
466 this part if the spouse is charged with a homicide established by a preponderance of the  
467 evidence that meets the elements of any felony homicide offense in Title 76, Chapter 5,  
468 Offenses Against the Person, except automobile homicide, applying the same principles of  
469 culpability and defenses as in Title 76, Utah Criminal Code, including Title 76, Chapter 2,  
470 Principles of Criminal Responsibility.