

1 **POSTCONVICTION REMEDIES ACT AMENDMENTS**

2 2021 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Brady Brammer**

5 Senate Sponsor: Todd D. Weiler

7 **LONG TITLE**

8 **General Description:**

9 This bill amends the Postconviction Remedies Act.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ adds a lower standard for a petitioner to show prejudice when a prosecutor
- 13 knowingly failed to correct false testimony;
- 14 ▶ amends the grounds upon which a petitioner is not eligible for postconviction relief;
- 15 ▶ provides that post-conviction remedies petitions based on factual innocence or
- 16 requesting DNA testing are not subject to procedural or time bars;
- 17 ▶ modifies the factors that a judge may consider when determining whether to appoint
- 18 pro bono counsel; and
- 19 ▶ makes technical and conforming changes.

20 **Money Appropriated in this Bill:**

21 None

22 **Other Special Clauses:**

23 None

24 **Utah Code Sections Affected:**

25 AMENDS:

26 **78B-9-104**, as last amended by Laws of Utah 2018, Chapter 221

27 **78B-9-106**, as last amended by Laws of Utah 2017, Chapter 447

28 **78B-9-107**, as last amended by Laws of Utah 2017, Chapter 447

29 **78B-9-109**, as last amended by Laws of Utah 2008, Chapter 288 and renumbered and

30 amended by Laws of Utah 2008, Chapter 3
31 **78B-9-301**, as last amended by Laws of Utah 2018, Chapter 86
32 **78B-9-402**, as last amended by Laws of Utah 2013, Chapter 46

33

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

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

36 **78B-9-104. Grounds for relief -- Retroactivity of rule.**

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

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

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

46 (c) the sentence was imposed or probation was revoked in violation of the controlling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

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

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

52 (i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of
53 trial or sentencing or in time to include the evidence in any previously filed post-trial motion or
54 [~~post-conviction~~] postconviction proceeding, and the evidence could not have been discovered
55 through the exercise of reasonable diligence;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

81 (2) The court may not grant relief from a conviction or sentence unless in light of the
82 facts proved in the postconviction proceeding, viewed with the evidence and facts introduced at
83 trial or during sentencing:

84 (a) the petitioner establishes that there would be a reasonable likelihood of a more
85 favorable outcome [~~in light of the facts proved in the post-conviction proceeding, viewed with~~

86 ~~the evidence and facts introduced at trial or during sentencing.]; or~~

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

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

95 (b) Claims under Part 3, Postconviction Testing of DNA₂ or Part 4, Postconviction
 96 Determination of Factual Innocence₂ of this chapter may not be filed as part of a petition under
 97 this part, but shall be filed separately and in conformity with the provisions of Part 3,
 98 Postconviction Testing of DNA₂ or Part 4, Postconviction Determination of Factual Innocence.

99 Section 2. Section **78B-9-106** is amended to read:

100 **78B-9-106. Preclusion of relief -- Exception.**

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

- 103 (a) may still be raised on direct appeal or by a post-trial motion;
- 104 (b) was raised or addressed in the trial court, at trial₂ or on appeal;
- 105 (c) could have been but was not raised in the trial court, at trial₂ or on appeal;
- 106 (d) was raised or addressed in any previous request for post-conviction relief or could
 107 have been, but was not, raised in a previous request for [~~post-conviction~~] postconviction relief;
 108 or
- 109 (e) is barred by the limitation period established in Section **78B-9-107**.

110 (2) (a) The state may raise any of the procedural bars or time bar at any time, including
 111 during [~~the state's~~] an appeal from an order granting or denying [~~post-conviction~~]
 112 postconviction relief, unless the court determines that the state should have raised the time bar
 113 or procedural bar at an earlier time.

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

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

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

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

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

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

128 **78B-9-107. Statute of limitations for postconviction relief.**

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

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

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

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

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

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

141 (e) the date on which petitioner knew or should have known, in the exercise of

142 reasonable diligence, of evidentiary facts on which the petition is based; or

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

145 (3) (a) The limitations period is tolled for any period during which the petitioner was
146 prevented from filing a petition due to state action in violation of the United States
147 Constitution, due to physical or mental incapacity, or for claims arising under Subsection
148 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308.

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

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

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

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

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

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

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

160 **78B-9-109. Appointment of pro bono counsel.**

161 (1) (a) If any portion of the petition is not summarily dismissed, the court may, upon
162 the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the
163 petitioner in the ~~[post-conviction]~~ postconviction court or on ~~[post-conviction]~~ postconviction
164 appeal.

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

167 (2) In determining whether to appoint counsel, the court ~~[shall consider the following~~
168 ~~factors]~~ may consider:

169 ~~[(a) whether the petition or the appeal contains factual allegations that will require an~~

170 evidentiary hearing; and]

171 ~~[(b) whether the petition involves complicated issues of law or fact that require the~~
172 ~~assistance of counsel for proper adjudication.]~~

173 (a) whether the petitioner is incarcerated;

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

175 (c) the likelihood that an investigation will be necessary;

176 (d) the complexity of the factual and legal issues; and

177 (e) any other factor relevant to the particular case.

178 (3) An allegation that counsel appointed under this section was ineffective cannot be
179 the basis for relief in any subsequent ~~[post-conviction]~~ postconviction petition.

180 Section 5. Section **78B-9-301** is amended to read:

181 **78B-9-301. Postconviction testing of DNA -- Petition -- Sufficient allegations --**
182 **Notification of victim.**

183 (1) As used in this part:

184 (a) "DNA" means deoxyribonucleic acid.

185 (b) "Factually innocent" means the same as that term is defined in Section ~~[78B-9-402]~~
186 78B-9-401.5.

187 (2) ~~[A person]~~ An individual convicted of a felony offense may at any time file a
188 petition for postconviction DNA testing in the trial court that entered the judgment of
189 conviction if the ~~[person]~~ individual asserts factual innocence under oath and the petition
190 alleges:

191 (a) evidence has been obtained regarding the ~~[person's]~~ individual's case that is still in
192 existence and is in a condition that allows DNA testing to be conducted;

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

195 (c) the ~~[person]~~ individual identifies the specific evidence to be tested and states a
196 theory of defense, not inconsistent with theories previously asserted at trial, that the requested
197 DNA testing would support;

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

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

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

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

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

208 (g) the [person] individual is aware of the consequences of filing the petition,
209 including:

210 (i) ~~[those]~~ the consequences specified in Sections 78B-9-302 and 78B-9-304; and

211 (ii) that the [person] individual is waiving any statute of limitations in all jurisdictions
212 as to any felony offense the [person] individual has committed which is identified through
213 DNA database comparison.

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

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

220 (5) (a) (i) ~~[A person]~~ An individual who files a petition under this section shall serve
221 notice upon the office of the prosecutor who obtained the conviction, and upon the Utah
222 attorney general.

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

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

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

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

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

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

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

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

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

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

248 (iii) the petitioner who has filed for postconviction DNA testing under Section
249 78B-9-201 is serving a sentence of imprisonment and is indigent.

250 (b) Under this Subsection (7), costs of DNA testing include [~~those~~] costs that are
251 necessary to transport the evidence, prepare samples for analysis, analyze the evidence, and
252 prepare reports of findings.

253 (8) If the [person] individual is serving a sentence of imprisonment and is indigent, the

254 state shall pay for the costs of the testing under this part, but if the result is not favorable to the
255 [person] individual, the court may order the person to reimburse the state for the costs of the
256 testing, ~~[pursuant to]~~ in accordance with Subsections 78B-9-302(4) and 78B-9-304(1)(b).

257 (9) Any victim of the crime regarding which the [person] individual petitions for DNA
258 testing, who has elected to receive notice under Section 77-38-3 shall be notified by the state's
259 attorney of any hearing regarding the petition and testing, even though the hearing is a civil
260 proceeding.

261 Section 6. Section 78B-9-402 is amended to read:

262 **78B-9-402. Petition for determination of factual innocence -- Sufficient**
263 **allegations -- Notification of victim -- Payment to surviving spouse.**

264 (1) A person who has been convicted of a felony offense may petition the district court
265 in the county in which the person was convicted for a hearing to establish that the person is
266 factually innocent of the crime or crimes of which the person was convicted.

267 (2) (a) The petition shall contain an assertion of factual innocence under oath by the
268 petitioner and shall aver, with supporting affidavits or other credible documents, that:

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

271 (ii) the specific evidence identified by the petitioner in the petition establishes
272 innocence;

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

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

275 (v) viewed with all the other evidence, the newly discovered evidence demonstrates
276 that the petitioner is factually innocent.

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

280 (ii) If the court finds the petition does not meet all the requirements of Subsection
281 (2)(a), ~~it~~ the court shall dismiss the petition without prejudice and send notice of the dismissal

282 to the petitioner and the attorney general.

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

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

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

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

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

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

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

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

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

305 (b) The court shall review the evidence and may dismiss the petition at any time in the
306 course of the proceedings, if the court finds that the evidence of factual innocence relies solely
307 upon the recantation of testimony or prior statements made by a witness against the petitioner,
308 and the recantation appears to the court to be equivocal or ~~self-serving~~ self serving.

309 (5) A person who has already obtained postconviction relief that vacated or reversed

310 the person's conviction or sentence may also file a petition under this part in the same manner
311 and form as described above, if no retrial or appeal regarding this offense is pending.

312 (6) If some or all of the evidence alleged to be exonerating is biological evidence
313 subject to DNA testing, the petitioner shall seek DNA testing [~~pursuant to~~] in accordance with
314 Section 78B-9-301.

315 (7) Except as provided in Subsection (9), the petition and all subsequent proceedings
316 shall be in compliance with and governed by [~~Rule 65C,~~] Utah Rules of Civil Procedure, Rule
317 65C and shall include the underlying criminal case number.

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

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

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

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

329 (iii) If, upon completion of the initial review, the court does not dismiss the petition,
330 [~~it~~] the court shall order the attorney general to file a response to the petition.

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

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

338 (ii) No bona fide and compelling issue of factual innocence exists if the petitioner is
339 merely relitigating facts, issues, or evidence presented in a previous proceeding or if the
340 petitioner is unable to identify with sufficient specificity the nature and reliability of the newly
341 discovered evidence that establishes the petitioner's factual innocence.

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

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

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

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

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

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

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

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

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

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

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

368 (c) (i) If any payments are already being made to the petitioner under this part at the
369 time of the death of the petitioner, or if the finding of factual innocence occurs after the death
370 of the petitioner, the payments due under Section 78B-9-405 shall be paid according to the
371 schedule under Section 78B-9-405 to the petitioner's surviving spouse.

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

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