

**FACTUAL INNOCENCE AMENDMENTS**

2012 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Brad L. Dee**

Senate Sponsor: Todd Weiler

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**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



28           **78B-9-404**, as last amended by Laws of Utah 2010, Chapter 153

29           **78B-9-405**, as last amended by Laws of Utah 2011, Chapter 131



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

32           Section 1. Section **78B-9-402** is amended to read:

33           **78B-9-402. Petition for determination of factual innocence -- Sufficient**  
34 **allegations -- Notification of victim.**

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

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

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

42           (ii) the specific evidence identified by the petitioner in the petition establishes  
43 innocence;

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

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

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

48           (b) The court shall review the petition in accordance with the procedures in Subsection  
49 (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a).  
50 If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall  
51 dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the  
52 attorney general.

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

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

58           (ii) a court has found ineffective assistance of counsel for failing to exercise reasonable

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.

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

184 (a) The Utah Office for Victims of Crime shall pay from the Crime Victim Reparations  
185 Fund to the petitioner within 45 days of the court order under Subsection (1) an initial sum  
186 equal to either 20% of the total financial assistance payment as determined under Subsection  
187 (1) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the  
188 total amount owed.

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

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

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

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

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

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

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

205 (iii) be allocated so that the entire amount due to the petitioner under this section has  
206 been paid no later than 10 years after the effective date of the appropriation made under  
207 Subsection (2)(b).

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

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

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

217 (c) The reduction of payments pursuant to Subsection (3)(a) or the tolling of payments  
218 pursuant to Subsection (3)(b) shall be determined by the same court that finds a petitioner to be  
219 factually innocent under [~~Title 78B, Chapter 9,~~] Part 3, Postconviction Testing of DNA, or this  
220 part.

221 (4) (a) A person is ineligible for any payments under this part if the person was already  
222 serving a prison sentence in another jurisdiction at the time of the conviction of the crime for  
223 which that person has been found factually innocent pursuant to [~~Title 78B, Chapter 9,~~] Part 3,  
224 Postconviction Testing of DNA, or this part, and that person is to be returned to that other  
225 jurisdiction upon release for further incarceration on the prior conviction.

226 (b) Ineligibility for any payments pursuant to this Subsection (4) shall be determined by  
227 the same court that finds a person to be factually innocent under [~~Title 78B, Chapter 9,~~] Part 3,  
228 Postconviction Testing of DNA, or this part.

229 (5) Payments pursuant to this section:

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

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

234 (6) If a court finds a petitioner to be factually innocent under [~~Title 78B, Chapter 9,~~]  
235 Part 3, Postconviction Testing of DNA, or this part, the court shall also:

236 (a) issue an order of expungement of the petitioner's criminal record for all acts in the  
237 charging document upon which the payment under this part is based; and

238 (b) provide a letter to the petitioner explaining that the petitioner's conviction has been  
239 vacated on the grounds of factual innocence and indicating that the petitioner did not commit  
240 the crime or crimes for which the petitioner was convicted and was later found to be factually  
241 innocent under [~~Title 78B, Chapter 9,~~] Part 3, Postconviction Testing of DNA, or this part.

242 (7) A petitioner found to be factually innocent under [~~Title 78B, Chapter 9,~~] Part 3,  
243 Postconviction Testing of DNA, or this part shall have access to the same services and  
244 programs available to Utah citizens generally as though the conviction for which the petitioner



245 was found to be factually innocent had never occurred.

246 (8) Payments pursuant to this part constitute a full and conclusive resolution of the

247 petitioner's claims on the specific issue of factual innocence. Pre-judgment interest may not be

248 awarded in addition to the payments provided under this part.

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**Legislative Review Note**

**as of 1-24-12 2:57 PM**

**Office of Legislative Research and General Counsel**