

2011

Jed A. Gressman v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

JED A. GRESSMAN,

:

Plaintiff/Appellee,

:

Case No. 20110965-SC

v.

:

STATE OF UTAH,

:

Respondent/Appellant.

:

Appeal from an Order and Judgment of the Fourth Judicial District Court,
Juab County, State of Utah, Honorable Steven L. Hansen, Presiding

REPLY BRIEF OF RESPONDENT/APPELLANT

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UTAH APPELLATE COURTS

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CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

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1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 6,147 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X5 in 13 Times New Roman.



Nancy L. Kemp
Assistant Attorney General

Dated: 8/15/2012

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REPLY BRIEF OF RESPONDENT/APPELLANT

ARGUMENT

I. THE TRIAL COURT MISAPPLIED RES JUDICATA BY
ERRONEOUSLY CONFLATING THE INDEPENDENT ACTIONS FOR
VACATUR AND FACTUAL INNOCENCE

A fundamental flaw infects the trial court's decision: its conflation of two distinct and independent legal actions, one for vacatur of plaintiff's conviction and the separate action for a declaration of factual innocence. *See* Aplt. Brief at 11-12. Just as the vacatur court erroneously treated the vacatur action as if it were a continuation of plaintiff's criminal case, *see* Aplt. Brief at 13 n.8, the trial court erroneously treated plaintiff's factual innocence case as if it were a continuation of the vacatur action. But those actions are not one and the same. They comprise different elements and have different standards of proof. The findings necessary to sustain vacatur are different from and not sufficient to prove factual innocence. *See* Aplt. Brief at 10-13. Therefore, the trial court's application of res judicata was error.

Plaintiff's attempt to show that the State could have raised its *res judicata* argument in the trial court falls short. He bases this contention on three arguments first raised in the reply memorandum supporting plaintiff's motion for summary judgment: (1) that the affidavit of plaintiff's victim should be disregarded (*see* Aplee. Brief at 11 and its Add. B at 6-8); (2) that the vacatur of plaintiff's conviction served as "*factual evidence*" of his alleged innocence (*see* Aplee. Brief at 11 and its Add. B at 8 (quotation in Add. B)); and (3) that the county prosecutor's actions in moving to vacate the charges against plaintiff bar the State from contesting plaintiff's factual innocence (*see* Aplee. Brief at 11 and its Add. B at 9-10). But those arguments do not address the elements of *res judicata*. Although plaintiff's trial court reply memorandum argued generally that "the doctrines of waiver, issue and claim preclusion, equitable estoppel, collateral estoppel and *res judicata* all apply to criminal actions as they do in civil proceedings," R. 245, plaintiff did not specifically argue *res judicata*, and his attempt here to establish *res judicata* ignores critical elements of that preclusion doctrine. Even in the trial court, plaintiff argued in passing only that "the parties involved in the 1996 proceedings are the same parties now before the Court. In that proceeding, factual evidence was presented supporting Mr. Gressman's innocence." R. 245.

But *res judicata* requires more. If plaintiff's argument invokes claim preclusion, it falls short by failing to demonstrate that the claim sought to be barred—here, the factual innocence claim—was available in the first action. Because a statutory claim for factual

innocence did not exist and was thus not available at the time of plaintiff's vacatur action, claim preclusion cannot apply. If plaintiff's argument sounds in issue preclusion instead, it fails because plaintiff cannot show that the issue of factual innocence is identical to the issue of vacatur. In either case, plaintiff's passing mention of a handful of legal theories, unaccompanied by any meaningful analysis of their individual elements, was insufficient to raise res judicata in the trial court as a dispositive issue—especially because it was raised for the first time in plaintiff's summary judgment reply memorandum. *See Soriano v. Graul*, 2008 UT App 188, ¶ 11, 186 P.3d 960 (declining to address issue where the litigant "first made mention of it, in a cursory manner, in her reply brief to the trial court.").

Notably, plaintiff's summary judgment motion and supporting memorandum raised only a single reference to any species of preclusion doctrine, contained in a single sentence and citing no legal authority: "Gressman's factual innocence is 'the law of the case' and should be followed by this Court." R. 170. But law of the case is not applicable in the context of separate actions. As this Court explained in *Jensen v. Cunningham*, "[t]he law of the case doctrine applies to preclude litigation of an issue when the identical issue was litigated earlier *in the same case*." *Jensen v. Cunningham*, 2011 UT 17, ¶ 49 n.5, 250 P.3d 465 (emphasis added). The present case is not the same case as the vacatur action. Even if the issues in the two cases were identical—and they are not—law of the case would not apply.

In short, the State had no reasonable opportunity to address in the trial court the issue of res judicata, raised only in plaintiff's reply memorandum supporting his summary judgment motion. Even if it had, plaintiff did not establish there that all elements of res judicata were met. Consequently, the trial court's application of res judicata on the basis of the vacatur action was error that is within this Court's jurisdiction to correct.

II. LEGISLATIVE HISTORY DOES NOT OVERCOME THE STATUTE'S PLAIN MEANING UNDER THE COURT'S TRADITIONAL RULES OF STATUTORY CONSTRUCTION

Plaintiff argues that, in interpreting the language of the factual innocence statute, this Court should not look beyond comments made in legislative committee hearings. But to do so would violate this Court's caution against using legislative history as the primary means to discern legislative intent. As the Court has explained, if a statute's "text is ambiguous, we may look to legislative history to inform our construction of the statutory language. But the legislative history is not law. It is at most of secondary relevance in informing our construction of the law, which is found in the statutory text." *Myers v. Myers*, 2011 UT 65, ¶ 28, 266 P.3d 806 (internal citation omitted). *See also State v. Winward*, 907 P.2d 1188, 1190 (Utah App. 1995) ("Only when the statute's language is ambiguous will we seek guidance from the legislative history and policy considerations.").

The enrolled copy of the factual innocence amendments unambiguously announces at the outset that "[t]his bill makes clarifying amendments to factual innocence

provisions." Factual Innocence Amendments, H.B. 307, 2012 Gen. Sess. (Utah 2012) at 1:11 (Add. A). It is well established that amendments which clarify or amplify how the law should have been interpreted from the outset may be retroactively applied, and doubts about the character of an amendment are resolved by examining the amendment's title or preamble. *Salt Lake Cnty. v. Holliday Water Co.*, 2010 UT 45, ¶ 43, 234 P.3d 1105. Regardless of what was said in the preliminary committee hearings, the legislature ultimately chose to pass the bill expressly as a clarification. Because the legislature's chosen language is not ambiguous, resort to legislative history as determinative of legislative intent is both unnecessary and inappropriate.

Moreover, the legislative history is not as one-sided as plaintiff suggests. Assistant Attorney General Scott Reed explained to the House Law Enforcement and Criminal Justice Committee that the amendments were "not an overhaul by any means." Certified Transcript, *Factual Innocence Amendments: Hearing on H.B. 307 Before the H. Law Enforcement and Criminal Justice Cmte.*, 2012 Gen. Sess. (Utah 2012) (Add. B) at 2.¹ He then had an exchange with Representative Litvak, who stated, without contradiction,

¹All references are to the certified transcript plaintiff filed with the Court on July 9, 2012, appended to this brief as Addendum B. The inaccurate, uncertified transcript excerpts contained in Add. A to plaintiff's response brief are the subject of a motion to strike filed on June 27, 2012, on which the Court has deferred ruling. *See* Order of July 16, 2012. Plaintiff has filed no certified transcript of the February 28, 2012 Senate Judiciary, Law Enforcement and Criminal Justice Standing Committee hearing, but relies only on the uncertified excerpts also included in that addendum and subject to the State's motion to strike.

his understanding that the statutory compensation payments in the original legislation were intended only for the wrongfully incarcerated individual. *See* Add. B at 4.

Representative Litvak then asked Mr. Reed to explain the provisions regarding survival of factual innocence claims solely for name-clearing purposes. Mr. Reed acknowledged that "there hasn't been a clear statement of public policy with regard to whether or not petitioner must be alive or dead at the time of petition or at the time of conclusion." *Id.*

In an apparent reference to the present action, he noted that

[T]here is a determination by a Court in the State on a petition that the claim survived the death of the petitioner. And again, that has been decided by that judge and that's the way it is, but in future cases, is there a line that the legislature wants to draw and say that these claims need to be brought to someone's attention during the lifetime of the petitioner or not?

Id. He then provided an additional example, asking whether a convicted murderer executed long ago would be entitled to a name-clearing proceeding—a far cry from the present case. In a follow-up question, Representative Arent expressed confusion about the purpose of including an effective date for any procedural changes applicable to filing and adjudication of a petition. Mr. Reed pointed out that the statute had undergone a prior amendment that carried language applying its provisions to "new petitions filed on or after the effective date of this amendment." *See* Add. A at 5:128. Because that language referred specifically to the old amendment, clarity demanded the new amendments to specify their own effective date. To assure her understanding of that point, Representative Arent again queried, "Would this [provision regarding the effective

date of any procedural changes] have an impact on any pending Supreme Court cases, cases that should be pending before the Utah Supreme Court?" Add. B at 5. To that question, Mr. Reed answered, "No." *Id.* In other words, had the legislature opted to curtail survivability of name-clearing proceedings, that procedural change would not apply to cases currently pending before this Court. To suggest, as plaintiff does, that Mr. Reed's response meant that no part of the amendments would apply to those pending cases would rob Representative Arent's specific, focused query—"Would *this* [date]" impact pending cases?—of its context and would violate the plain meaning of the legislature's unambiguous declaration that the amendments clarify the statute. Mr. Reed's comment was limited to assuring that plaintiff's case—and any others still pending after the death of the petitioner—would go forward to conclusion. It did not agree that clarifications of the substantive law would be irrelevant to the outcome.

In light of the certified transcript, plaintiff overreaches by suggesting that Representative Litvak's concerns—and Mr. Reed's response to them—extend to both the potential "extinguishing of a claim and right of recovery after the death of an innocent convict despite the continuing concerns and needs of his family." Aplee. Brief at 9. Representative Litvak carefully drew the distinction in his comments:

I can see where the State may have some concern that if someone who files a claim passes away when it comes to the *compensation that was really meant, I think, for the individual who had served the time in prison*, but I can also say, thinking about it from the family perspective, that if this is my relative who's claiming their innocence, it[']s going in the process, and then they tragically pass away while it's in the middle of the process, for a family

member there may be some reason why I would want to see at least whether or not there was a determination on the factual innocence. And is there a possibility to strike some distinction there?

Add. B at 4 (emphasis added). Representative Litvak's uncontradicted statement that statutory compensation had always been understood as a remedy for only the individual claiming factual innocence belies plaintiff's expansive interpretation.

Mr. Reed's observations also show that at the time of the House committee hearing, the amendments were in an early draft, and the language had not crystallized into its final form. In fact, the legislative intent was still being debated, as demonstrated by Mr. Reed's question to the committee: "[I]s there a line that the legislature wants to draw and say that these claims need to be brought to someone's attention during the lifetime of the petitioner or not?" *Id.* The preliminary nature of both the draft and the discussion at that time demonstrate the folly of relying on legislative history instead of legislative language as a definitive guide to interpretation of the amendments as finally enacted.

III. WITHOUT GIVING PRECLUSIVE EFFECT TO THE VACATUR ACTION, THERE ARE INSUFFICIENT GROUNDS TO SUSTAIN THE TRIAL COURT'S DETERMINATION OF FACTUAL INNOCENCE

Plaintiff makes several additional arguments that the trial court's determination of factual innocence can be sustained even without giving preclusive effect to the vacatur action. None is well taken.

A Neither the County Attorney's Motion to Vacate nor the State's Failure to Appeal Establishes Plaintiff's Factual Innocence

First, plaintiff contends that factual innocence was established because the prosecuting attorney was the moving party in the vacatur action, and the State did not appeal from the vacatur decision. But the prosecuting attorney's "belief that this is not a prosecutable case[,]" R. 393 at 15:26 - 16:1 (hearing), does nothing to establish plaintiff's factual innocence; it shows only that the prosecutor believed the evidence of guilt was no longer sufficient to sustain a criminal conviction beyond a reasonable doubt—a conclusion the State had no reason or obligation to second-guess. In effect, plaintiff asks the Court to equate the terms "not guilty" and "innocent." Yet they are not synonymous. A person who is "not guilty" of a crime may have, in fact, engaged in conduct that violates the law, but cannot be held legally responsible for his behavior under the applicable burden of proof. By contrast, a person who is "factually innocent" has not engaged in violative conduct at all. As this Court has observed, "[t]he measure of certainty the law demands before finding guilt reflects the balance we are willing to strike between insuring that all of the guilty are brought to justice and preventing the conviction and punishment of the innocent." *State v. Reyes*, 2005 UT 33, ¶ 11, 116 P.3d 305. The distinction between "not guilty" and "innocent" is the very reason that vacatur and factual innocence are two distinct causes of action governed by separate criteria. Once again, plaintiff erroneously conflates those two independent standards.

B. The Striking of the Victim's Affidavit in the State's Summary Judgment Motion Does Not Establish Plaintiff's Factual Innocence

Next, plaintiff argues that "the State told the district court that it based its case and summary judgment motion entirely on the affidavit of Corrie Robertson." Aplee. Brief at 15. In support, he points to the transcript of the hearing on the parties' cross-motions for summary judgment. But plaintiff overstates the facts. The State's counsel argued that the affidavit was "the basis of the State's motion for summary judgment," not the basis of the entire case. R. 391 at 23:23-24. What evidence may have been produced in an evidentiary hearing, had the trial court denied both parties' summary judgment motions, is a matter of speculation. The State's counsel pointed out additional evidence that might be provided in an evidentiary hearing:

[W]e call Mrs. Robertson to testify, and she testifies to exactly what's now in her affidavit *with further details*. We put on the DNA report which the Court already has before it, and *there may be a police report or two from 1991* or whenever the date of this incident was, and we may or may not be able to find any of the *Juab County officers who were involved and medical reports from that time*.

R. 391 at 34:15-21 (emphasis added). Even plaintiff's attorney sought discovery while the motions were pending decision, indicating his belief that additional evidence might be adduced. *See* R. 391 at 38:4 - 39:11.

Moreover, plaintiff misapprehends the purpose of summary judgment. Under Utah R. Civ. P. 56(c), summary judgment is appropriate

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Nothing in the rule suggests that a party is limited to its basis for summary judgment in pursuing further proceedings should the motion be denied. Summary judgment merely functions to avoid protracted litigation in circumstances where the pleadings and other papers demonstrate that further inquiry would not alter the grounds for decision. And nothing in the rule alters the burden of proof in the underlying action. *See Orvis v.*

Johnson, 2008 UT 2, ¶ 18, 177 P.3d 600. Despite the fact that the trial court struck the affidavit on which the State's motion was based as inadmissible hearsay,² plaintiff retained the burden to prove the elements of his factual innocence claim: to show, by newly discovered, clear and convincing evidence not known by him or his counsel at the time of conviction or sentencing, that he did not engage in the conduct for which he was convicted or relating to any lesser included offense, and that he did not commit any other felony reasonably connected to the facts supporting the underlying information or indictment. *See* Utah Code Ann. §§ 78B-9-402(1) and (2) and 78B-9-404(1)(b) (West 2009 and Supp. 2011); 78B-9-401.5(1) and (2) (West Supp. 2011).³ Plaintiff did not

²Plaintiff notes that "[t]he State has not attacked that decision in its appeal brief and may not do so now." Aplee. Brief at 15. The State agrees. However, it observes for the Court's information that under Utah Code Ann. § 78B-404(2)(b) (West 2009 and Supp. 2011), the trial court in a factual innocence action may consider "(b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility." That provision was not changed by the 2012 amendments.

³These provisions are unchanged by the 2012 amendments.

fulfill that burden. The entire argument in his motion for summary judgment comprised a single paragraph that did not address the elements of a factual innocence claim:

Two DNA testing labs have produced test results strongly supporting Gressman's steadfast assertion of innocence. The complaining witness's story of what occurred has changed in material [but here unidentified] respects since she first complained of being raped. Her story is suspect at best. The District Attorney for Juab County concluded that post-conviction evidence warranted dismissal of all charges against Gressman and his release from prison. The Juab County District Court agreed and entered an order of dismissal. Gressman's factual innocence is "the law of the case" and should be followed by this Court. Justice has been delayed far too long and should not be delayed further.

R. 170. Regardless of the fate of the State's motion for summary judgment, plaintiff did not carry his burden to affirmatively prove each element of his factual innocence claim, and the trial court's grant of his motion was error.

C. The State Challenges Only Issues of Law and Therefore has No Obligation to Marshal the Evidence Supporting the Trial Court's Findings of Fact

Plaintiff argues that the State has violated Rule 24(a)(9) of the Utah Rules of Appellate Procedure by failing to marshal the evidence supporting the trial court's "finding" of factual innocence. But he fails to recognize that, under the circumstances of this case, the trial court's factual innocence determination is a conclusion of law, not a finding of fact. Scrutiny of the trial court's opinion reveals that it made no findings of fact—nor would findings have been appropriate in the context of ruling on the parties' competing summary judgment motions, which are premised on the ground that no genuine issues of material fact exist. *See* Utah R. Civ. P. 56(c). Tellingly, plaintiff

identifies no specific finding of fact for which the State has failed to marshal the supporting evidence.

Contrary to plaintiff's representation, the State's appeal challenges only legal conclusions: (1) that the 1996 vacatur decision was res judicata on the issue of plaintiff's factual innocence claim, (2) that plaintiff's widow was entitled to posthumous compensation, and (3) that prejudgment interest was due on the award of posthumous compensation. Because no finding of fact is at issue on appeal, the State is under no marshaling burden.

D. The Sole Evidentiary Basis for the Trial Court's Grant of Summary Judgment to Plaintiff was the Transcript of the Vacatur Hearing

Plaintiff contends that the evidence of his factual innocence is clear and convincing. But the sole basis the trial court articulated for its grant of plaintiff's summary judgment motion is the transcript of the vacatur hearing: "After reviewing the transcript of the hearing in which Mr. Gressman's judgment was vacated, this Court concludes that a determination of factual innocence was made at that time." R. 357. The court neither identified the elements of a factual innocence claim nor attempted to show how the vacatur court's findings filled those elements.

Ironically, plaintiff's argument is based in large part on the affidavit of plaintiff's victim. *See* Aplee. Brief at 20-21. This argument cannot be credited because the affidavit was—on plaintiff's motion—stricken from the record. Moreover, the argument contains additional, opprobrious accusations of alleged conduct by the victim that are not

supported by the record but for which plaintiff's counsel provides an inapposite record citation to the vacatur court's findings of fact—falsely implying that they include findings relating to intoxication, medical examination results, domestic violence, and a prior accusation of rape. *See* Aplee. Brief at 20-21. No such findings were entered by the vacatur court. Some—but not all—of those accusations do appear in less specific form in County Attorney Leavitt's argument in the vacatur hearing when he recounted "a story that Mr. Hancock and Mr. Gressman have maintained from the beginning[.]" R. 393 at 11:19-20, but Leavitt makes no reference to the latter two accusations. Those are found only in the argument plaintiff's attorney made to the trial court without substantiation, R. 391 at 26:25 - 27:4, and in Addendum C to plaintiff's response brief, a non-record summary of unsubstantiated representations about plaintiff and his victim. Moreover, as detailed in the State's principal brief, the alleged inconsistencies in the victim's testimony regarding her pregnancy and changes in her recall of plaintiff's last name and the description of the vehicle used in the assault were known at the time of trial and explained to the jury. *See* Aplt. Brief at 15-16. Therefore, they cannot constitute new evidence for purposes of a factual innocence claim.

Plaintiff's evidence of factual innocence consists of nothing more than the vacatur decision and additional unsupported accusations against the victim, at least one of which (her alleged 1995 cohabitant abuse action) purportedly occurred well after plaintiff's 1993 crime and has no bearing on plaintiff's guilt or innocence. Contrary to plaintiff's

argument, the record does not contain clear and convincing evidence of his asserted factual innocence.

E. The Factual Innocence Statute Requires an Evidentiary Hearing if the State Does Not Stipulate to a Petitioner's Factual Innocence

Plaintiff contends that the factual innocence statute does not require an evidentiary hearing, either in its present form or before the 2012 amendments. He argues in a footnote that such a requirement would violate the Utah Constitution's separation of powers doctrine. The constitutionality of the statute has not been previously raised, and nothing in the record addresses it. Moreover, a three-sentence footnote containing no detailed analysis or discussion of relevant authority is inadequate briefing of the issue under Utah R. 24(a)(9), as applied to appellees' briefs by subsection (b). The issue is therefore not properly before the Court for decision. The State notes, however, that the hearing requirement is a function of a court rule, Utah R. Civ. P. 65C, properly adopted by this Court, and consequently does not present a separation of powers problem.

Plaintiff further contends that even if Rule 65C applies to factual innocence claims, the rule's requirement for a hearing does not mandate an evidentiary hearing. First, there can be no doubt that Rule 65C applies; the enrolled copy of H.B. 307 explicitly states that the bill "*clarifies* that all proceedings are governed by Utah Rules of Civil Procedure, Rule 65C[.]" Add. A at 1:16-17 (emphasis added). Second, the rule

expressly contemplates an evidentiary hearing on the merits of the petition. Under what is now subsection (l) of the rule,⁴

After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

- (l)(1) consider the formation and simplification of issues;
- (l)(2) require the parties to identify witnesses and documents; and
- (l)(3) require the parties to establish the admissibility of evidence expected to be presented at *the evidentiary hearing*.

(Emphasis added.) In light of this language, it defies logic to suggest that the hearing required by the factual innocence statute in the event of a contested petition is anything short of an evidentiary proceeding. The fact that the trial court may dispose of the petition on legal grounds—such as those presented in dispositive motions—does nothing to change the requirement of an evidentiary hearing where the State does not stipulate to factual innocence. Moreover, there would be no necessity to "identify witnesses and documents" or "establish the admissibility of evidence" if an evidentiary hearing were not required.

Nothing in plaintiff's argument overcomes the fact that the trial court's decision is unsupported by clear and convincing evidence. The court placed exclusive reliance for its determination on the vacatur of plaintiff's conviction. In doing so, it employed the

⁴Current subsection (l) was designated as subsection (j) at the time plaintiff filed his petition and became subsection (k) in 2010. The language of all three versions is identical.

doctrine of res judicata without affording the State an opportunity to address that theory. It failed to address the elements of res judicata or to show how the vacatur decision satisfied those elements. And it failed to hold an evidentiary hearing as the statute mandates in the absence of a stipulation to factual innocence by the State. For these reasons, the trial court's decision must be reversed.

IV. THE SURVIVAL OF PLAINTIFF'S PETITION FOR NAME-CLEARING PURPOSES DOES NOT ENTITLE HIS WIDOW TO STATUTORY COMPENSATION OR PREJUDGMENT INTEREST

The State acknowledges that plaintiff's factual innocence claim survived his death for name-clearing purposes.⁵ The statute now explicitly provides that "[a] claim for determination of factual innocence under this part is not extinguished upon the death of the petitioner." Add. A at 5:129-130. But just as the legislature provided for survival of the statute's name-clearing function, it also provided that compensation does not survive: "The assistance payment provisions of Section 78B-9-405 may not apply, and financial payments may not be made, if the finding of factual innocence occurs after the death of the petitioner. In addition, any payments already being made under Section 78B-9-405 shall cease upon the death of the petitioner." Add. A at 5:130-33. This language is consistent with Representative Litvak's uncontradicted understanding, as expressed in the

⁵The State objects to plaintiff's argument that "it is callous and unconvincing for the State to suggest a convict's widow has no legitimate interest in following through with the clearance of her husband's good name." Aplee. Brief at 29. The survival of plaintiff's factual innocence claim for purposes of name-clearing has never been an issue on appeal.

House committee hearing, that the statutory assistance payments had always been intended only for the factually innocent person who had been wrongfully incarcerated. *See* Point II, above.

Plaintiff suggests that posthumous compensation is protected by Utah's survival statute, Utah Code Ann. § 78B-3-107. But Section 107 applies by its terms only to personal injury and wrongful death actions: "A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of another, does not abate upon the death of the wrongdoer or the injured person." Utah Code Ann. § 78B-3-107(1)(a) (West 2009). Subsections (1)(b) and (c) reinforce the point. Subsection (b) limits the survivors' recovery to general and special damages, and subsection (c) further limits the recovery to only special damages if the party dies from unrelated causes more than six months after the incident giving rise to the claim. Plaintiff has provided no analysis of the survival statute or pertinent case law showing that a factual innocence claim is a personal injury as contemplated by the statute or that statutory assistance payments under the factual innocence statute are general or special damages under the survival statute. His two-sentence argument is inadequate under Utah R. App. P. 24 (a)(9) to warrant the Court's deliberation.

Plaintiff's resort to legislative history is equally unpersuasive. He quotes, without proper citation, comments made by Senator Howard Stephenson in the floor debate on the third reading of S.B. 16, the bill that originally enacted the factual innocence statute, in

the 2008 general legislative session. He represents Senator Stephenson as holding the "view that the government had a responsibility to **make people whole for the 'awful price paid by the person imprisoned and his or her family.'**" Aplee. Brief at 28. But Senator Stephenson's remarks were not directed toward any question of extending compensation to persons other than the one wrongly imprisoned. Instead, the senator spoke in general support of the bill:

I rise in great support of this legislation, and appreciate Senator Bell's leadership in helping to move this forward and all of those who have been involved in this. I liken this to the amendments we have made recently in the government immunity laws in Utah, which basically have protected government from the liability for injuries caused to citizens. And we have raised those limits, not to where they should be in my opinion, but we have improved that, so that when government swings its fist and causes damage, there is a responsibility on the part of government to, to some degree to make people whole. I think we can only imagine what the horror must be to be imprisoned wrongly and the, the awful price that is paid by the person imprisoned and his or her family. And I think this legislation is long overdue and I hope that everyone will support it.

Audio Floor Debate, 3d Reading, S.B.16, 2008 Gen. Sess. (Utah 2008) at 11:43 - 13:06.

A simple recognition that wrongful imprisonment has an impact on the family of the person incarcerated does not constitute an intent to compensate the family after the person's death. Had the legislature intended compensation to survive the death of the petitioner, it could have provided so explicitly—as it did in the workers' compensation statute. *See* Aplt. Brief at 19-20. The legislature's initial choice not to provide for posthumous compensation, coupled with the clarifying amendments expressly denying it, indicate that statutory compensation was never intended to survive the petitioner's death.

As to prejudgment interest, plaintiff claims the best evidence supporting the trial court's decision is the decision itself. Aplee. Brief at 29. But the very inconsistency of that decision with binding precedent triggers the need for this Court's review. While plaintiff persists in asking the Court to treat the compensation payments fixed by the statutory formula as tort damages based on actual harm, the statute is not susceptible to his proposed interpretation. The statute does not contemplate individual circumstances of factual innocence claimants in determining the amount of compensation due; rather, it fixes a formula based on the number of years of wrongful incarceration (with a fifteen-year cap) times the most recently published average Utah nonagricultural payroll wage. Utah Code Ann. § 78B-9-405(1)(a) (West 2009 and Supp. 2011); Add. A at 7:184-90. No demonstration of an individual's earning capacity or other unique circumstances vary the amount of compensation available under the formula.

As the Court recognized in *Fell v. Union Pacific Railway*, 32 Utah 101, 88 P. 1003, 1006, such fixed statutory formulas for allowable damages are an exception to the rule for determining damages in tort claims. Because the issue in *Fell* was whether a tort claimant was entitled to prejudgment interest, the court proceeded to elaborate a test for determining when, in tort cases, prejudgment interest should be allowed—a test that depended on whether or not damages could be determined by resort to fixed rules of evidence and known standards of value. Subsequent cases have, as plaintiff points out, applied that test in the context of other tort and insurance claims, but plaintiff has

identified no case invalidating *Fell's* distinction of statutorily fixed damages as an exception from prejudgment interest. The continuing vitality of that distinction is demonstrated by the court of appeals' denial of prejudgment interest on a statutory award of damages for a wrongful lis pendens in *Winters v. Schulman*, 2001 UT App 105, 2001 WL 357124. Although the court noted that the appellant in that case suffered no actual damages and prejudgment interest was therefore unnecessary to provide full compensation for his loss, it recognized, as an independent ground for its decision, that the award, "which was a penalty fixed by the statute, was clearly distinguished by the *Fell* court as a damage award for which prejudgment interest is not allowable." 2001 UT App 105 at *1. The fact that *Winters* is an unpublished opinion does not vitiate its authority. Rule 30(f) of the Utah Rules of Appellate Procedure provides that "unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State."

Plaintiff's arguments for posthumous compensation and prejudgment interest lack any basis in the statutory text and the amendments clarifying it. At most, plaintiff disagrees with the policy chosen by the legislature. But that disagreement, however heartfelt, cannot overcome the legislature's intent as expressed in the language of the statute.

V. PLAINTIFF HAS ASKED FOR NEITHER SUMMARY
DISPOSITION OF HIS APPEAL NOR SANCTIONS AGAINST
OPPOSING COUNSEL

Plaintiff asserts that the Court should summarily affirm the trial court's order because "[t]he decision in this case will have no precedential value." Aplee. Brief at 35. Plaintiff fundamentally misapprehends the function of the Court's decisions by suggesting that the Court can simply ignore error by the trial court. Regardless of whether statutory changes may limit the reach of the Court's decision on some issues, the trial court's misapplication of the principles that govern factual innocence claims cannot go unaddressed. The question of whether vacatur of a conviction conclusively establishes factual innocence is one the amendments do not resolve. Even if the Court holds the trial court's application of res judicata erroneous, any remand for additional proceedings may still raise issues of posthumous compensation and prejudgment interest. Moreover, there may be other cases begun under the pre-amendment statute that involve the same issues. Finally, although he could have moved for summary disposition under Rule 10 of the Utah Rules of Appellate Procedure, plaintiff failed to do so. And even if he had, he cannot show, as the rule requires, that the appeal raises no substantial questions.

Plaintiff gratuitously includes, as an addendum to his brief, correspondence between the parties regarding his threat to seek sanctions against the State's counsel under Rule 11(c) of the Utah Rules of Civil Procedure. But following the State's response to him, plaintiff did not file his motion in this Court. Consequently, the State does not deem

it appropriate to counter plaintiff's accusations here. However, the State invites the Court to peruse its response to plaintiff's attorney contained in Addendum G to plaintiff's brief.

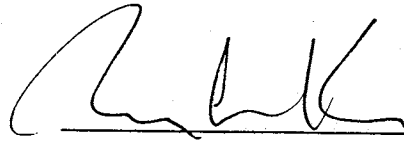
In addition, plaintiff has based his argument for sanctions against the State in part on the two-page "Chronology of Delay" appended to his brief as Addendum F. *See* Aplee. Brief at 37. The State objects to this non-record addendum as unrelated to the articulated basis for plaintiff's unfiled motion for sanctions. Moreover, the majority of the alleged delays took place before the State's current appellate counsel, who entered her appearance on February 9, 2012, was involved in this case.

Neither the unfiled motion for sanctions nor the "Chronology of Delay" pertains to the merits of the appeal. They appear to be included in plaintiff's brief only to inflame the Court and should be disregarded for that reason.

CONCLUSION

The sole basis for the trial court's conclusion that plaintiff is factually innocent is the prior vacatur of his conviction. Because factual innocence comprises different elements and was not a claim available at the time of the vacatur proceedings, the trial court's application of res judicata was error. Even if it were not, the plain language of the statute cannot support the award of posthumous compensation and prejudgment interest to plaintiff's widow. For these reasons, the State respectfully requests the Court to reverse the decision of the trial court.

Dated this 15th day of August, 2012.

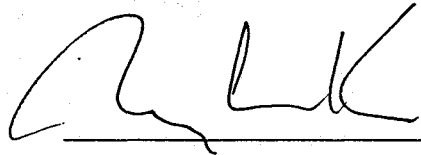


Nancy L. Kemp
Assistant Attorney General
Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of August, 2012, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to the following:

Douglas G. Mortensen
Law Office of Douglas G. Mortensen, L.C.
648 East 100 South
Salt Lake City, Utah 84102



ADDENDUM A

FACTUAL INNOCENCE AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brad L. Dee

Senate Sponsor: Todd Weiler

Cosponsors: V. Lowry Snow

Richard A. Greenwood

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 assistance payments on a claim of factual innocence are 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of

57 trial or sentencing or in time to include the evidence in any previously filed post-trial motion or
58 postconviction motion, and the evidence could not have been discovered by the petitioner or
59 the petitioner's counsel through the exercise of reasonable diligence; or

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

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

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

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

74 (iii) has never been presented to a court.

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

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

84 (6) If some or all of the evidence alleged to be exonerating is biological evidence

85 subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

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

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

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

95 (b) The assigned judge shall conduct an initial review of the petition. If it is apparent
96 to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in
97 previous proceedings or presenting issues that appear frivolous or speculative on their face, the
98 court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal
99 upon the petitioner and the attorney general. If, upon completion of the initial review, the court
100 does not dismiss the petition, it shall order the attorney general to file a response to the petition.
101 The attorney general shall, within 30 days after receipt of the court's order, or within any
102 additional period of time the court allows, answer or otherwise respond to all proceedings
103 initiated under this part.

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

112 (d) If the parties stipulate that the evidence establishes that the petitioner is factually

113 innocent, the court may find the petitioner is factually innocent without holding a hearing. If
114 the state will not stipulate that the evidence establishes that the petitioner is factually innocent,
115 no determination of factual innocence may be made by the court without first holding a hearing
116 under this part.

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

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

123 (12) A petition to determine factual innocence under this part, or Part 3, Postconviction
124 Testing of DNA, shall be filed separately from any petition for postconviction relief under Part
125 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

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

129 (14) A claim for determination of factual innocence under this part is not extinguished
130 upon the death of the petitioner. The assistance payment provisions of Section 78B-9-405 may
131 not apply, and financial payments may not be made, if the finding of factual innocence occurs
132 after the death of the petitioner. In addition, any payments already being made under Section
133 78B-9-405 shall cease upon the death of the petitioner.

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

135 **78B-9-404. Hearing upon petition -- Procedures -- Court determination of factual**
136 **innocence.**

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

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

141 (2) The court may consider:

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

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

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

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

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

152 (i) be vacated with prejudice; and

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

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

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

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

167 (6) At least 30 days prior to a hearing on a petition to determine factual innocence, the
168 petitioner and the respondent shall exchange information regarding the evidence each intends

to present at the hearing. This information shall include:

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

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

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

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

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

(b) the determination is based upon the newly discovered material evidence described in the petition, pursuant to Section 78B-9-402, and as defined in Subsection 78B-9-401.5(3).

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

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

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

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

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

(a) The Utah Office for Victims of Crime shall pay from the Crime Victim Reparations Fund to the petitioner within 45 days of the court order under Subsection (1) an initial sum

equal to either 20% of the total financial assistance payment as determined under Subsection (1) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the total amount owed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) Payments pursuant to this section:

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

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

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

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

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

253 (7) A petitioner found to be factually innocent under [Title 78B, Chapter 9,] Part 3,
254 Postconviction Testing of DNA, or this part shall have access to the same services and
255 programs available to Utah citizens generally as though the conviction for which the petitioner
256 was found to be factually innocent had never occurred.

257 (8) Payments pursuant to this part constitute a full and conclusive resolution of the
258 petitioner's claims on the specific issue of factual innocence. Pre-judgment interest may not be
259 awarded in addition to the payments provided under this part.

ADDENDUM B

JUL - 9 2012

CERTIFICATION OF LEGISLATIVE TRANSCRIPT

I hereby certify that the attached document consisting of 17 signed pages
is a true and authentic verbatim record of the House Law Enforcement and
Criminal Justice Committee hearing on
House Bill 307 (2012 General Session) which occurred
on February 3, 2012 and is available online via the Utah Legislative website;
<http://le.utah.gov>.

Jandy L. Jerney
name

Chief Clerk
title

July 9, 2012
date certified

Representative Oda: February 3, 2012. We have some minutes we need to approve from January 31st so I need a Motion.

Representative Frank moved to approve the minutes of the January 31, 2012 meeting

Representative Oda: Item No. 1 on the agenda - House Bill 307 Factual Innocence Amendments - Representative Dee. Floor is yours Representative and Mr. Majority Leader.

Representative Dee: Let's get that mic up there – whoa, there we go. Yeah that's miced up. I was fishing for my glasses – my reading glasses – a few minutes ago and they weren't in the case. So I turned to Representative Brad Galvez who was a part of the Brad Caucus and I said "if I can't find my glasses and I told him I couldn't find my glasses – he said he'd cover for me. So, without the glasses he'd be sitting here running the bill. No actually, I found them. Thank you.

Representatives, the factual innocence amendments – some of you have a history with this as I do, the factual innocence statute was enacted in 2008, amended in 2010. I voted for that bill and I'm proud to say I did. It was a great bill and before I get really into the litany of what this particular bill does, let me just make this statement clear to this committee - no one that is innocent of a charge should serve time in jail and if we can find by evidence that is later found – new evidence – that that particular person in innocent, we have a responsibility – not only an obligation – but a responsibility to correct that error. And that's what the bill in 2008 and 2010 has done. There have been people that have benefitted from that legislation and rightly so. This particular bill, as we look at what this does is it tightens a little thing up and I am going to make it very, very simple and then I'm going to ask the Attorney General's Office maybe to speak to it and then we'll have a bit more conversation – I'm sure.

But what this particular bill does is it allows the judicial proceeding to take place, but it must address new evidence. So, um, to make it in very simple terms, I don't think it's right that we should say we want to second guess a jury that made a decision several years ago or a particular judge that might have made a decision several years ago based on the facts of the situation of a case that was before them at that time. I also don't want to go back and guess – second guess – prosecuting attorneys or what they could or could not have done or, in fact, what they should or should not have done, or defense attorneys in the same theme. I'm willing to look at additional evidence that proves innocence. As I said, I think that's our responsibility and our vocation. But to go back and look at a case and say that a prosecutor should have done something different or a defense attorney should have done a different defense style or a different point of their defense, I've worked with a lot of defense attorneys and I understand that sometimes they weigh the evidence and they decide- I'm going to use this goal or procedure and I'm going to not go this particular direction.- I don't think it's a good thing for us to come back years later and try to decide whether that was intentional or not and whether it was good or not and ask a judge many years later, without witnesses in front of him, without evidence in front of him or her, and ask him to make a decision of the determination on evidence that was presented at trial. Unless, you can show me that there is new evidence that was not presented at trial and should be considered now. That's the intent of the legislation. One more thing I want to say before anybody gets

worried about this - this does not reach back. I have had those discussions with the attorney general's office, in fact today, we have had additional discussions and they have assured me again that this does not reach back. If there are cases that have been preexisting before this particular legislation goes into effect, they stand - because that was the adjudication that was made with the facts and evidence at that particular time. This is not an attempt to reach back. This is not retroactive on any case that may be out there. (00:4:56-00:5:25) This is something that we look at and a standard we set in moving forward from this particular time. With that I'd like to give some time to the Attorney General's Office Scott Reed.

Representative Oda: Make sure to state your name and who you are with.

Assistant Attorney General Scott Reed: Yes, Scott Reed from the Attorney General's Office. I'm the division chief, the Criminal Justice Division. Members of the Committee, I appreciate the time, I don't want to take up a lot and wait for your questions, but when this law was first enacted four years ago it kind of came to my division in the form of other duties as assigned. Since that time our office has fielded roughly twelve or more of these petitions in the course of the last four years. We see a kind of longitudinal aspect of this. I want to represent to the Committee that from examination of this bill, you understand that this is not an overhaul by any means. There's no stricken language in the bill but for a couple of minor phrases. So, really what we were doing here is refining a standard, taking care of a couple of other unforeseen consequences that may have been initially in the bill and I'm gonna submit to any questions you have.

Representative Oda: Okay. Are there any questions from Committee Members? **Representative Litvack.**

Representative Litvack: Thank you Mr. Chair. I do have a few questions. First of all, I want to thank both Representative Dee and the AG's office for the time they have spent with me going through the bill and making sure I understood it from their prospective. When we talk about - and I will say that Representative Dee very accurately describes the intent of the original legislation in terms of the focus on newly discovered evidence. I think that from a lay person's mind when I read this it is pretty clear with that intent. But I do have a question because sometimes that line does get blurred and the legislation - I think- recognized some of that. But, where do we draw the line between rehashing when something is - when an old case or old evidence is being rehashed versus where in current statute it allows? I'm looking at my - starting on lines 38, the petitioning - where the petition is based on new evidence coming forward and the judge is going to make a determination of whether that petition is valid or not based on that newly discovered material evidence? But then the current statute also allows that new evidence to be viewed in light of all of the other evidence of that case. So, it is within the judges authority - I spoke the right word - or purview to look at the entire case once that new evidence has been submitted and that's affirmed in line 46 where it says "viewed with all the other evidence." So, I'm assuming all the other evidence they are talking about - that the evidence from the case, 15, 25 years ago. That is also reaffirmed on lines 163 and even the new language where you say "the Court after considering all the evidence." So how do we - there seems to be a fuzzy line there. How do we

determine when we are rehashing old evidence and when we are just incorporating that old evidence as a part of the discussion of newly discovered evidence?

Scott Reed: That, Representative is an excellent question. I think the ultimate objective of this statute, and if it were the perfect mousetrap, would be to screen out every frivolous or meritless claim that may come along, at the same time allowing every meritorious claim to be heard by a judge. And that is our objective. How we get there it may take some time. To address your question sir, I think that it's a matter of degree and weight at some point and I think when we envision the easy question in a factual innocence case it's when a petitioner has something conclusive, like DNA evidence where we can all agree, that decides the issue. Unfortunately, there are not going – every one of these cases is not going to be based upon DNA and especially, I think, in older cases where the technology really wasn't available at the time. There may be some opportunity for that retesting nowadays and we have a mechanism for that in a separate portion of the statute. When you get to the question of factual innocence that's determined by evidence that's not scientifically conclusive, then I think we have the difficulty that you recognize in weighing what was known then against what is known now and seeing how it all meshes together into this ultimate conclusion that the person is not responsible for the crime.

Representative Litvack: So, it is fair to say that even with the clarifying language in here trying to highlight – I think it's important to say that focusing on new evidence is not new, and again, that was the original intent of the initial legislation. By highlighting newly discovered evidence on those effect lines 163 through 170, is it fair to say then that, particularly in cases where there's not DNA evidence, which I understand tends to be the majority cases, will never have – there is no way to clearly or fix this. I mean clearly fix this to the point where there's always going to be some sort of exchange there in terms of weighing when a judge may be overstepping their bounds in terms of rehashing a case versus properly finding that balance? Isn't the system – and therefore isn't this bill so that it protects the interests of both potential innocence as well as the interest of the State in the "original convictions and the victims by allowing the AG – the Attorney General's office to in essence say yes we agree with the Judge's determination of the petition and that this person is factually innocent and stipulate to that or if we don't then we go to a hearing and at that point the petitioner has to show that clear and convincing evidence. So, isn't that the real safeguard there?"

Scott Reed: Yeah, and it works both ways. I agree with Representative Dee and yourself. This is a mechanism in criminal justice that is absolutely essential. We have to have this safety net for the innocent. However, there are those who are not by definition innocent who want to take advantage of the opportunity to do this and you have to have some gatekeeper function built into the system and then newly discovered evidence provision in part serves that purpose. It also provides the petitioner with the basis to come in and get the recognition of the Court and say "look, this was not known to anyone until now, at least in a court of law and it's compelling and you've gotta take a look at this because this is upon – you know, this is the basis for my claim." So, again we are trying to build the mouse trap that weeds out the bad claims and allows the good claims to go through to conclusion.

Representative Litvack: Mr. Chairman I have one additional question, but a quick comment. I guess there will always be some win over. I mean, minus DNA evidence, there have to be a process. Do we

have to have some level of trust in the process and what you're trying to do from your prospective is, from your prospective get a little more trust in the process for the County attorneys, for the AG's office.

Scott Reed: And for the judges who have to make the last ultimate decision and not feel like they're in the untenable position of having to second guess a jury.

Representative Litvack: One last question Mr Chair. Lines 120 – the, if in essence someone who has filed a claim of factual innocence passes away that extinguishes the claim or the claim would go away. Can you explain the rationale behind that, whether or not that's based on a court case and one thought that I have, is it possible, I can see where the State may have some concern that if someone who files a claim passes away when it comes to the compensation that was really meant, I think, for the individual who had served the time in prison, but I can also say, thinking about it from the family perspective, that if this is my relative who's claiming their innocence, its going in the process, and then they tragically pass away while it's in the middle of the process, for a family member there may be some reason why I would want to see at least whether or not there was a determination on the factual innocence. And is there a possibility to strike some distinction there?

Scott Reed: Well again I guess without some kind of bright line, you run the risk that claims from times gone by are going to surface and become permissible, simply because there hasn't been a clear statement of public policy with regard to whether or not petitioner must be alive or dead at the time of petition or at the time of conclusion. In the particular case, there is a determination by a Court in the State on a petition that the claim survived the death of the petitioner. And again, that has been decided by that judge and that's the way it is, but in future cases, is there a line that the legislature wants to draw and say that these claims need to be brought to someone's attention during the lifetime of the petitioner or not? My imperfect example would be Joe Hill, I mean you read in the paper here lately that Joe Hill may or may not have committed the murder for which he was prosecuted and executed and although there may not be a whole lot of evidence or new evidence in that case, it is certainly a legitimate concern and is that going to promulgate yet another claim that we need to litigate?

Representative Litvack: Mr. Chair, thank you for the indulgence of the committee.

Representative Oda: Thank you Representative Litvack. Representative Arent.

Representative Arent: Thank you. Some of my questions have been asked but I am curious about the date on line 119 and the significance of that date.

Scott Reed: When the statute was last amended was two years ago and the language of the bill as I recall was that and because it was effective upon signing, the language of that particular bill in 2010 contained the language "after the effective date of this amendment." Leg counsel noticed that that's no longer tenable language in the statute and so I think made the appropriate choice to designate the time when that occurred which was the signing date for the governor of that particular bill. What it's created is an impression that somehow we are trying to take the whole thing and move back two years, which is not I don't think anybody's intention here. So that - I think we're going to be in discussions about maybe adjusting that so that it doesn't make it appear or doesn't confuse the issue of

retroactivity or how much of this is being dragged back two years in order to do over that whole process. That's not our intent.

Representative Arent: Would this have an impact on any pending Supreme Court cases, cases that should be pending before the Utah Supreme Court?

Scott Reed: No. (17:23)

Representative Oda: Any other questions or comments from Committee? Saying none. Did you have anything Representative Dee?

Representative Dee: No, well, okay. I shouldn't say no. and then keep talking. To address the Representative's concern and I have committed that that date we are going to be working on that date. In fact I've committed to several people that we are going to be working that date. As I stated first, we are not reaching back on any case. (18:02)

Representative Oda: Seeing no further lights. We're going to take this to the audience. Is there anyone in the audience who would care to speak to this? Come on up. When you get to the mic please state your name and who you represent if you represent someone or any organization and before leave make sure you sign the sign up sheet there.

Daniel Medwed: Thank you Representative Oda. My name is Daniel Medwed. I'm a Professor of Law at the University of Utah at J. Quinney College of Law. I'm also President of the Board of Directors of the Rocky Mountain Innocence Center. I will be speaking on behalf of the Rocky Mountain Innocence Center today not the University of Utah.

We are a bit concerned about the impact of these proposed amendments not only on pending cases but on future cases. We have tremendous respect for Representative Dee and we're very pleased to hear that there is no intent for this, for these proposed amendments to reach back and so we are very heartened about the idea of working with the Attorney General's Office in the coming weeks to change that language. The so called retroactivity issue to get to a point where everyone's very comfortable with that. But as I did say, we are somewhat concerned about the potential impact on future cases, specifically on the following issue. This legislation was passed in 2008 after a one year working group process composed of a bipartisan group of prosecutors and defense lawyers and academics and other people and we believe that the statute, as it currently stands, truly reflects the intent of the legislature, which was to provide a fair and appropriate recourse for potentially innocent criminal defendants to prove their innocence in court. Newly discovered evidence is the typical way in which one can prove innocence. However, sometimes evidence might not reach the very high rigid standard of newly discovered evidence. So with that in mind, the original statute included a provision that said that if the evidence could not, could have been discovered with reasonable diligence by the attorney earlier in the process and it was not discovered, maybe by an oversight or maybe just bad luck, then a court in the interest of justice could still consider that evidence even though it might not technically rise to the level of newly discovered evidence. The idea is it's not old evidence either. A jury never heard that evidence. So we're concerned that the proposed amendment could remove that interest of justice language and

suggest that a judge in his or her discretion could not even consider evidence that has been newly presented to the court because technically it does not rise to the level of newly discovered evidence. So we have just received this proposed amendment and we're looking forward to working with the Attorney General's office and Representative Dee to work through some of these issues in the coming weeks. We were hopeful maybe that it could be set aside until later in the session as we begin to work through that process. If there are any questions I would be more than happy to answer them or try too.

Representative Oda: Representative Seelig.

Representative Seelig: Thank you sir. Thank you for coming here today and thanks to the sponsor for bringing the bill forward. I have a question. Is there

Representative Oda: Would you bring the mike down a little bit?

Representative Seelig: Is this better? (laughter) You're going to deserve this one then. You know one of my favorite things about serving in this legislature with many of my colleagues is how concerned we are when governmental systems do unjust things to members of the public. That is one of the beautiful things about being here in Utah. So, I would like to know if this type of statute is rated or if there is a national comparison or some type of benchmark measure that articulates where we fall as Utahns in a continuum of protecting the rights of the innocent? Does anything like that exist and if so, how do our current statutes rate and where do these potential changes take at?

Professor Medwed: Thank you. I believe Utah rates very high on the list of states. Again, when you passed this legislation in 2006, I trotted it around the country as an exemplar of a legislature doing justice balancing the interest of fairness against finality, innocence against guilt. My concern with this change Representative Seelig is that it might be a little step back, maybe more than a little step back. That's why we want some time to explore the potential ramifications on future cases. If I may, if I could give a brief hypothetical to illustrate a potential problem. Let's say there is a murder case and somebody's convicted. Years later a person comes out of the woodwork to confess to the crime. That person was unknown to any lawyers, the police or anybody at the time of trial. That would be newly discovered evidence and that would be an appropriate basis for filing a petition and presenting evidence in court. Let's say—let's change the facts. Let's say in that same murder case this person who years later confessed was just mentioned in a police report as a potential person of interest. Defense lawyers say that name, sent a private investigator to the address, couldn't find the person, never tracked the person down and that information was never presented to a jury at trial. Years later that suspect confesses to a crime. We are concerned that these amendments would prevent a court from considering that evidence because that evidence might not technically be considered newly discovered evidence because possibly it could be argued, and may be argued by the Attorney General's Office or, interpreted by a court, that that evidence should have been found through the exercise of reasonable diligence before therefore it's not truly new and under these amendments a court might not even allowed to entertain that evidence. In our view, that would not be consistent with the thrust and the intent of this legislation was to prepare or offer an appropriate remedy for the truly factually innocent. Thank you.

Representative Litvack: Thank you Mr. Chair. Most of my question was answered, I just wanted to – the interest of justice that you’re talking about is in lines 53 through 65, is that correct?

Professor Medwed: That’s correct.

Representative Litvack: Can you explain, I guess, how or why you feel – so that’s not being changed, that’s staying in the bill?

Professor Medwed: Yes.

Representative Litvack: So, can you explain for us how you feel that could be compromised with some of the changes that are being made.

Professor Medwed: Yes, thank you. Here’s why. Those lines Representative Litvack relate to the petition, what may be included in the petition that a petitioner will, may file under the statute. The changes which are, are you noted, lines 163 to 170, relate to the evidence that a judge may – must consider in rendering a decision after a hearing. Those changes, the proposed changes, do not refer back to the interest of justice language. Instead those changes only refer to the previous language that relates to newly discovered material evidence. So, our concern is that whereas a petitioner may be able to refer to evidence that could have been discovered through the exercise of due diligence – reasonable diligence at the time of trial in the petition. We’re concerned that a judge may not consider that evidence in rendering a final decision.

Representative Arent: Thank you. I would like your comment to make sure that I understand your opinion on two of the changes. The first one being on line 120 that we have discussed earlier about the claim being extinguished upon the death of the petitioner and the second being the very last line of the bill about prejudgment interest.

Professor Medwed: Thank you. With respect to the change on lines 120 to 121, the survivorship change, it is our position that a person or the estate of a person should be allowed to pursue a factual innocence claim, if only to clear the name of the deceased. That is our position. The idea is that someone who has died and is deprived of the opportunity to prove his or her innocence should not necessarily be foreclosed through his or her survivors from having a clear name, if in fact the evidence supports it. That is our position. With respect to the prejudgment interest, we would prefer to some extent that prejudgment interest could be included but we are not as insistent on that. In part because we recognize that this legislation is quite generous and quite fair. Again, going through Representative Seelig’s point on where Utah falls on the spectrum of states, we rate very high on that list in terms of providing recourse for innocent defendants. So that’s a proposal that we are mildly concerned about but not as concerned about as we are with others.

Representative Oda: Thank you. Representative Butterfield.

Representative Butterfield: Trying to weigh the - as Representative Seelig mentions the sensitivity we want to have to citizens when we lock them up and be able prove their innocence. At what point though, I mean at some point we have to say we can’t clog up the resources by continually going after

"well you know, this wasn't done to my liking" or I'm not a legal scholar and I hope my way of approach to this, if you can bear with me, at what point do we say, you know, we can't entertain every reach back, well this wasn't done correctly or, in my estimation, how much of that can we afford in the system?

Professor Medwed: That is an excellent question and I agree with the thrust of it which is at some point there has to be finality for victims, for all of the participants in the criminal justice system. It's our position that there should be finality including finality for the factually innocent, that they should be provided an opportunity, a final opportunity to clear their name. We believe that this legislation is the perfect balance, an excellent balance between fairness and finality. None of the proposed changes in my view necessarily prevent people from filing petitions. I'm not sure whether these proposed amendments are going to decrease the number of filings. Again, our major concern is the effect of these proposed amendments on what may be considered in the final determination of innocence. And it's our position that the bar should be very high. If you're going to prove your innocence you should meet a high bar. A jury has found you guilty, the appellate court has affirmed that decision, and the bar necessarily should be very high and we believe the bar as it stands is apt. The changes might raise it too high.

Representative Butterfield: Mr. Chair if I may. Could you elaborate on that bar for me a little bit? What — elaborate on the high standard that has to be met to go back and say, for example, this is a witness that may not be new evidence but it might be considered what?

Professor Medwed: Newly presented evidence.

Representative Butterfield: Newly presented evidence. Elaborate on that bar for me if you will.

Professor Medwed: Sure. The way the statute currently operates there is bar that says you have to have newly discovered evidence and there are a number of provisions that define newly discovered evidence. It couldn't have been discovered before, it can't be cumulative of other evidence presented at trial, and various other requirements. In addition, as I indicated previously, I think it was with respect to Representative Litvack's question, there is in the petition section of the statute a provision that says that a judge could entertain evidence that is not technically newly discovered evidence because perhaps a lawyer previously could have found it through the exercise of reasonable diligence. But in the interest of justice this evidenced should be considered along with the newly discovered evidence in considering whether someone is actually factually innocent. Taken together, the petitioner must show by clear and convincing evidence, which is a relatively high burden, it's higher than the typical civil case burden of preponderance of the evidence, you must show by clear and convincing evidence that the petitioner is factually innocent. It's our position that that is quite high and my understanding is that only three people so far have been able to achieve that at the trial court level in Utah.

Representative Oda: Thank you very much. I've got comment here. Now, you're looking at this, I think almost from an extreme standpoint is the way I'm seeing this. A person that discovers potential new evidence but not something that can be shown to be factual, that that going to give him factual innocence, can still petition for a new trial. Correct?

Professor Medwed: Oh, I'm sorry. Under this new legislation you have to put forth

Representative Oda: Not this legislation. I'm talking about normal procedure.

Professor Medwed: There are other procedures, you're exactly right Mr. Chair. New trial motion procedures and appellate procedures

Representative Oda: So, this doesn't take any of that stuff away, none of those rights away?

Professor Medwed: That's correct.

Representative Oda: Okay, so that, this is actually a separate area from that. Correct?

Professor Medwed: That's correct. It's a separate procedure just to prove your innocence.

Representative Oda: This factual evidence means it's something so clear that it's not something that needs to go back to a jury.

Professor Medwed: That's correct. It's new evidence that should be presented to a judge.

Representative Oda: Correct. So, I think it kind of sounded to me like you're mixing those together. Okay, so I think we need to make sure that that's absolutely clear that they're separate. The other thing is that as some of the others have eluded, how do you control the frivolous filing for this?

Professor Medwed: That's a very good question. The quality control is contained I think in the statute by requiring newly discovered evidence that if credible would prove factual innocence. The idea is - and I'm not sure, perhaps Mr. Reed has data on how many of the twelve filings he has entertained were dismissed as frivolous or dismissed before the hearing stage. I'm not privy to that information. But I believe the high standards in the petition section of this legislation are enough to prevent people from getting through the gates, so to speak.

Representative Oda: It's not necessarily getting through the gate that I'm concerned with, it just the filing by those who think: "I'm just going to clog up the system." Each time it goes before a judge to just review you're taking up docket time, you're taking up attorney time, you're taking up all kinds of state tax dollars.

Professor Medwed: You're exactly right.

Representative Oda: So, and in the future all its going to do nothing but grow bigger and bigger and bigger. Especially from some inmates at the prison who make it a part of their entertainment, I guess you can say, to file these motions and everything else.

Professor Medwed: You're exactly right Mr. Chair. With every procedure there's always a risk of frivolous filings. I wish that were not the case. I'm sure many people wish that were not the case. The question is whether an appropriate balance is struck between providing a remedy for the truly factually innocent, even if it meets on the margins. There may be people who will file frivolous motions and that, in my view, is a balance that we, as Utahns, need to strike as a normative matter for justice.

Representative Oda: Thank you. My personal feeling is - I think we've separated the two types. So, I'm - thank you very much.

Professor Medwed: Thank you Mr. Representative.

Representative Oda: There are no more questions or comments so thank you. Is there anyone else in the audience who would care to speak to the committee? Mr. Boyden.

Paul Boyden: Paul Boyden, Executive Director, Statewide Association of Prosecutors. Just a brief comment. Clearly, the prosecutors of the State are supportive of this legislation. As you mentioned earlier, our experience with frivolous filings from inmates goes back a very long way. There's nothing new about that. What is new is this process. The factual innocence bill is an absolute infant in the legal process. This is something that we've only been dealing with a couple of years and so we're going to have to continue to monitor this and see that we don't get overwhelmed by frivolous filings and see that we keep this thing under control. The flip side, of course, is we don't want to shut it off to that where those who really are innocent can't be dealt with. However, I personally, having been in the system for some time have really not much concern about the kind of situation where there it said in a police report that this witness was available somewhere and then having them come out later and confessing as to this thing, I cannot imagine any judge who would say that's not new evidence. I just don't think that's going to happen. Cause frankly we don't appoint holograms, we appoint judges and that's their job. They figure those things out and they've got a pretty good sense of justice. But, if they're going to error it's going to be on the side on letting more in and once we - if we let this statute get too broad it's much harder to pull it back than it is to pull it back early and then let it out a little bit at a time. It's kind of driving over a tire, you just can't back up easily on these sorts of things. So we support this legislation and, we're happy, the Attorney General's Office is doing a very fine job and we're sure they'll be able to work out any details they need too. Thank you.

Representative Oda: You had some questions, Representative Litvack.

Representative Litvack: Thank you Mr. Chair. Just wondering Mr. Boyden if could respond to the concerns that were expressed about the interest of justice that currently exist in the petitioning phase and your opinion as to whether the amendment in lines 163 to 170 would prevent that standard from being asserted or inserted into a hearing phase.

Paul Boyden: Okay, first you have the clear and convincing standard which is where we started with in this legislation. I'm sorry I'm taking them not quite in order but anyway. The determination is based on newly discovered evidence. When you're talking about the determination being made under newly discovered evidence, it may not, you don't have to say this particular piece of evidence outweighs all evidence that was ever put in on a case, this particular new piece of evidence may cast all of the other evidence that you had in a different light. That seems, you know, you can say oh well, we had this evidence in front of us but now that we know this, this all makes sense kind of thing. Again, trying it total redline, there is almost impossible. I don't see it to be a problem and I think that in the interest of justice they'll let it in.

Representative Litvack: At the hearing stage. So you don't share the concerns that Mr. Medwed expressed?

Paul Boyden: Actually I don't, I don't, because it just, in my experience if there's anything that smells like – in the interest of justice – we're really going to have to hear this so it's going to come in., I think we need to set the standards, make them as strong as we can, but I think judges will figure that out.

Representative Litvack: Thank you.

Representative Oda: Representative Butterfield.

Representative Butterfield: Mr. Boyden. Is the system burdened now with these cases?

Paul Boyden: Yes. The Attorney General's – if you talk to the administrators in the Attorney General's office you can certainly get that idea, yes. That they are now – that they are increasing. The thing about it is that these things can snowball. The more success that the legitimate cases have the more trend it is going to be for those who want to just file for – because they don't have anything else to do at the prison, to be quite honest.

Representative Butterfield: Can you quantify

Paul Boyden: I'm not trying to be too – no, I can't quantify it but I think the Attorney General's Office could do that.

Representative Butterfield: Regarding balance and striking this balance, why is this a better balance? Why would the proposed legislation be a better balance?

Paul Boyden: I think that it's really – I don't think it's a better balance than the original I think it's just reaffirming what the original intent was, that this be based on newly discovered evidence. It was the original idea. When we were talking to the legislature back then the Attorney General's Office was really kind of spearheading it and, but we were supportive of it and we talked about how this thing should work and we were talking nope, it should be newly discovered evidence because we don't want frivolous cases. I don't think it's changing the original intent. It's changing the words to be more specific.

Paul Boyden: Thank you Mr. Chair.

Representative Oda: Mr. Boyden, I have a real quick question. At the time of a filing for factual innocence finding of a judge, at the time of his review is he able at that point if he doesn't feel there's quite factual evidence for innocence that he could turn it over for another trial? Can he do that at that time?

Paul Boyden: No. This is not a review of the trial.

Representative Oda: But can he then make a suggestion for

Paul Boyden: They can

Representative Oda: at that point or

Paul Boyden: I believe not. I think those who actually work with these cases can answer that though, Mr. Chairman. I'm not really following your question.

Representative Oda: Someone files for factual innocence filing on that to say you're innocent by a judge, and while he's reviewing that he says well, I see some potential evidence here that may have been overlooked but I don't see this so clear and convincing that that I'm going to deem it to be factually innocent, but this may deserve going to another trial.

Paul Boyden: It doesn't have that option. That's not what this whole section is about. This is a separate proceeding after the fact.

Representative Oda: Okay.

Paul Boyden: Which is why we're concerned about it.

Representative Oda: Okay. Not being aware of what the procedures are

Paul Boyden: There has to be some finality in the criminal proceeding and it could have been tried and then upheld. There you are. I've been involved in cases in the past where we have found evidence that somebody really didn't do it and usually it's the prosecutor that comes back and get the conviction overturned.

Representative Oda: Okay. Thank you. Appreciate that. Is there anyone else in the audience who would care to speak to us. Come on up and state your name and who you represent if any.

Jensie Anderson: Thank you so much Mr. Chairman. My name is Jensie Anderson. I am a law professor at the University of Utah College of Law, the S.J. Quinney College of Law. I'm also the legal director of the Rocky Mountain Innocence Center. I just wanted to clarify a couple of concerns under the statute, a couple of things that I think may not be clear. This statute's been in existence since 2008 and twelve cases have been filed under this particular statute since that time. There's been no flood gate of cases, I mean this statute is incredibly strict, and stagnate, Dan Medwed said strikes a balance between fairness and finality and because the pleading requirements are so strict it's really not a statute that can be used and abused and it hasn't been. Of those twelve cases there have been findings of innocence in three of them. One was stipulated by the Attorney General's Office and the other two were through court proceedings. I think that's really important.

In 2010 because of the concerns about the possible filing of additional frivolous lawsuits, the pleading requirements were amended to make them more strict. So actually to address your concerns that more and more people would file and those were amended in 2010 to make them more strict. Again, the AG working with interested parties in the community came up with those in order to make sure that frivolous claims could be kicked out before they clogged up the system in any way. But what our – what our concern is, and again this only for people who factually innocence and if the judge finds at the initial

pleading stage that the person has not pled sufficient evidence to show actual innocence, the complaint is dismissed and there is no further remedy. There is no new trial, there is no – it is the end.

But what our concern is and I'm not sure that we've been completely clear, but in Section 402 where the interest of justice exception is the pleading section which says you have to plead newly discovered evidence and, but if there is newly presented evidence that may be considered in the interest of justice in the petition stage. What this amendment does is go only to the hearing stage. So this is after its made it through the judge, after the judge has decided it's not frivolous and after it's been signed to go to a hearing and that provision is left out of the hearing stage in Sections 404, on line 169. The way to fix that would be to add the words and 3(a) after the word and on that line and that would include that within the hearing section which means the petition section and the hearing section would be consistent. And that's our concern is that they are not consistent and that this doesn't clarify but rather takes away a right under the original intent of the statute which allowed someone to prove their innocence at a hearing once they made it through the petition stage. Thank you.

Representative Oda: Thank you. Make sure you sign the signup sheet there. There are no more questions. Is there anyone else in the audience? Seeing none I'm bringing this back to Committee for further questions, comments or action.

Representative Ipson: We're back to Committee for action?

Representative Oda: Yes.

Representative Ipson: I make the motion that we move out House Bill 307 out with a favorable recommendation.

Representative Oda: Okay. The motion is move out House Bill 307 as Committee favorably. Is there a discussion on that motion?

Representative Arent: I would like to reserve the right to make a motion. I have a question for this sponsor before we go any farther. We've had a lot of really good testimony today and there are some things you need to work out. I'm a little concerned about working that out and not having a chance to have the dialog that we need to continue to have on something this important and for that reason I would prefer to have this stay in Committee for one more hearing so we could have a chance to see any changes you were planning to make. I would like to get your thoughts on that.

Representative Dee: Thank you Representative. I think I'm trying to work as much as I possibly can with some new found friends that have come to me with their concerns and I have committed that I will continue to do that. As with most legislation, I think that trust is in the sponsor and I think I've developed that trust with Professor Medwed and those that are have some concerns and I think we'll move forward that as I've stated. I would like to put this on the board and if he and I have any further discussions, I'll circle it up until those discussions are had.

Representative Arent: Okay. I'd like to make a substitute motion to delete lines 16 at the end of the line, insert the word "and" and then delete lines 17 and 18 and also delete lines 120 and 121. I hope I've

done that correctly. What I'm trying to do is delete the section that says that the claim for factual innocence is extinguished upon the death of the petitioner. My rationale for that is that today I was persuaded that in some cases the family is going to want to prove the innocence later on and I hate to take that away from the family. So for that reason I want to take out that clause.

Representative Oda: Any discussion on that motion? Is there any discussion Representative Arent's motion? We'll take this to the sponsor for comment.

Representative Dee: Thank you. I appreciate the motion but I think it defeats exactly what we're talking about in the bill. We need finality on these things and obviously we want finality for the families, but how about the person who is not being represented here today. How about the victims? How long must they relieve this and for that reason I'd like to bring finality. If someone passes away, passes on then the victims ought to be able to be done with it also. So I think there's a lot of things we can do to pull the meat out of the bill and I think this is one of them.

Representative Oda: I've got a -- before we move on your motion, I was just checking with our counsel here and my understanding is that the 15 word limit even in deletion would apply and that exceeds the 15 words, so we should have that in writing.

Representative Arent: Could I get clarification on

Representative Greenwood: I was just going to ask that myself. So, is staff telling you that even though you delete it's as if it goes toward the 15 words?

Representative Oda: That's my understanding. Is that correct? Want to check? Don't want to break any rules. Okay, it sounds like deletion we can delete at any amount it sound like.

Representative Dee: With that Mr. Chairman, can I also address that because I thought that's, I need to go to that. Can I also make another comment?

Representative Oda: Please. Go ahead.

Representative Dee: I think there's another avenue that we're not submitting here and it's the victim, excuse me, if a petitioner's family wants to petition the board of pardons that's done quite regularly and a person that has expired, the board of pardons will usually kind of pardon and that services the same thing we're talking about here for the families.

Representative Oda: Thank you Representative. Further comments on the motion? Representative Ipson, you have a comment?

Representative Ipson: Oh yeah, should come back to me. I don't consider that a friendly motion and I would resist that and I speak against the motion. I think the bills been vetted and these guys have agreed to work on it. I think we ought to pass it out as originally, the original motion. I speak against it in substantive.

Representative Oda: I'm going to place the motion.

Representative Arent: Rep. Ipson.

Representative Oda: I'm sorry, go ahead.

Representative Arent: Because of the 15 word limit I was trying to figure out a way to craft a way to allow them to proceed without compensation but to at least clear the name and try and strike a balance there too. So, whether this passes or not and I would encourage and I think Representative Litvack has expressed some ideas on how this might work to try and strike a balance here so that we don't have someone going to try and clear, get compensation for someone who's been deceased for decades but that we are able to do something that makes sense in case of justice and we're all trying to go here in terms of making sure a name might be cleared but perhaps not compensation. I think that there are ways to work this out but again that's why I wanted to keep this in Committee so we could work out some of these things.

Representative Oda: Okay. Thank you Representative. I'm going to go ahead and place the motion. All in favor of the amendment say Aye. Any opposed? Will the no's raise their hand? I think I'll just name the yeses. Represent Arent, Representative Litvack and Representative Seelig were the yeses. Unanimously no, accept. We will go back to the underlying motion to pass out House Bill 307 favorably. Any further discussion on that motion?

Representative Litvack: Thank you Mr. Chair. Oh, I like humor. As I listen to the discussion both from the sponsor and the AG's office, and the concerns that were raised, I think I feel good about coming to the conclusion that it is clearly not the intent of this legislation to change the underlying purpose or intent of the current statute in factual innocence. I think we all have common ground and not wanting innocent people in prison or jail. I would say even including this notion of interest of justice, even though we did have, hear some concerns that that may be excluded, I don't think that's the intent of House Bill 307. The concern is that it may have the unintentional consequences of removing the interest of justice standard which could lead to factual innocence individuals staying in prison or jail on a technicality and I thank the sponsor for his commitment to continue to work with those that are raising these concerns to find that balance. But because those concerns are expressed and are there, I don't think it has been vetted enough and so at this time I don't feel like I can support House Bill 307 as is currently drafted but I have a lot of trust in the process moving forward that that balance can be found. Thank you Mr. Chairman.

Representative Oda: Thank you Representative. Representative Butterfield.

Representative Butterfield: To the motion, Representative Dee I am struggling why we really need this. I'm struggling to feel compelled where testimony that seem to me to say it doesn't change it a lot, it's the way it's being administered now, maybe I misunderstood that some and if I have to err I feel like I feel like I want to err on the side of, of a potentially innocent citizen that we've locked up. So, if I may Mr. Chair, I'd like to give, though I know the Represent- the majority leader will have a chance to sum so maybe we can save it for them, but I'm still struggling with why. I don't feel compelled that this that there's a compelling reason to change it and have potentially unintended consequences.

Representative Oda: Well, I'll have to do that in summation. Okay. We have Representative Greenwood.

Representative Greenwood: Thank you Mr. Chair. I'd just like to speak in favor of the motion. I do share some of the concerns that's been expressed today and specifically with line 120-121. I was sharing with the Chair during this discussion that even if I pass on my name is more valuable to me than any money out there and so if I happen to do something, some misfortunate deed and/or I am accused of doing some misfortunate deed between now and the time that I die and then I do pass on, I would like - even if it's a 100 years from now or 200 years from now, if there's something that's brought forward that shows that I did not do what I'm accused of doing I would like to have my name cleared. I don't think it's necessary to be compensated or my survivors to be compensated for it, but I would definitely like to have my name cleared on it. Also with that being said, with the sponsor to this piece of legislation I've known him for a lot of years and I've worked with him for a number of years in the legislature and I can honestly say that when he gives me his word on something, that is that he is going to continue to work on this, even if it does pass out of this Committee, I believe his word is good and I do believe that he'll continue to work on it and some of the concerns that have been expressed here that he will try to address them and make us all satisfied with it. So, I'm in support of the motion. Thank you.

Representative Oda: Okay. With that Representative Dee, the sponsor of the bill care to sum?

Representative Dee: Thank you Mr. Chair. I appreciate the comments because this is not an easy process for any of us. I've spent a lot of hours in discernment on this bill. This is not an easy thing and I agree that no one should serve time for being innocent. But I think that we just stepped across the line maybe an inch when and I know the good professor gave a hypothetical about an attorney that had information that they just had a person that was listed as a witness. Let me - if we're going to use hypotheticals, let's protect the other side too. How many times have you had someone come forward after someone's been found not guilty and say "whoa, whoa, wait a minute if you'd just done this we could have convicted that person." But they're protected from that because that's how much we honor that system. In this particular situation the public and the victims deserve some of that same protection, even though it's not equal, but some of that protection. Here's a hypothetical, so you have an attorney and this is not so hypothetical I have some really personal knowledge about it, you have an attorney that knew about some evidence but chose not to use it because his thinking at the time was to approach the innocence from another direction, because that's what defense attorneys do, they gamble sometimes. They think I can get a not guilty verdict better by going this direction. I bet you that on most of the cases out there today you will find a decision by an attorney where he makes a decision whether he will have this person testify or not or introduce this evidence or not. In this hypothetical now we say we must have new evidence, which is what we're asking for. But then I'm going to go back to the trial court fourteen years later in this particular case, I think that's about right, and I'm going to say you know if that attorney would have approached it from a different direction, he might have been innocent. What type of burden does that put on a judge to say well, did he consider that evidence or did he not? Or would he have been better to go this direction or use this defense? It's impossible to second guess that attorney or that jury. We don't allow it to happen in double jeopardy. We shouldn't

allow that judge to have to make that same decision on this particular issue. If you can show me clear and convincing evidence of new evidence, I'm all over it. That person should not be in jail, but I cannot go back fourteen years and determine the intent of an attorney or a jury or a judge. With that, we move on.

Representative Oda: Thank you Representative. To the maker of the motion, care to sum?

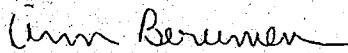
Representative Ipson: Thank you Mr. Chair. I just encourage each of us to pass this out and vote favorably and we'll trust that by the time it gets to the floor when the entire body gets to that it will be prepared and I trust the system and it will work and have everybody ready or he won't present it. I know he won't do that. So, it just – if we can move this forward and feel good about it. Thank you.

Representative Oda: Representatives with that I'll place the motion. All in favor of passing out House Bill 307 out favorably say Aye. Any opposed? Will the no's raise their hand? Representative Arent, Representative Litvack, Representative Seelig, and Representative Butterfield. Motion passes.

Thank you.

(01:06)

I, Ann Berumen, am a paralegal and legal assistant, and have been for 30 years. I am currently employed by the firm of Alder & Robb, P.C. On July 4, 2012, I went to the Utah Legislature website and found the House Law Enforcement & Criminal Justice House Bill 307 hearing of February 3, 2012 on the Factual Innocence amendment. I listened to the hearing and transcribed it word-for-word. I added the bolded emphasis.



Ann Berumen