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# FACTUALLY INNOCENT WITHOUT DNA? AN ANALYSIS OF UTAH'S FACTUAL INNOCENCE STATUTE

Nic Caine\*

## I. INTRODUCTION

“One thing we’ve learned by studying these cases and litigating these cases is it could really happen to anybody, . . . [n]obody is immune.”<sup>1</sup> With the advent of DNA identification technology in the late 1980s, the American criminal justice system underwent a transformation as the legal field and the public placed more focus on innocence related issues. In fact, a law school professor cleverly termed this phenomenon “innocentrism.”<sup>2</sup> Currently, all but one state has a postconviction DNA testing statute to prove innocence.<sup>3</sup> DNA identification technology has provided many individuals a chance at freedom.<sup>4</sup> Many other prisoners claiming innocence, however, do not have the benefit of DNA evidence, but they do have other compelling “newly discovered” evidence that may prove their innocence. For these prisoners, the majority of states have direct or collateral remedies to obtain new trials or habeas relief, but only Utah and Virginia have postconviction statutes that provide an avenue to prove factual innocence without the use of DNA.<sup>5</sup>

This Note first gives a brief background of the innocence movement. Then it discusses Utah’s non-DNA factual innocence statute, including the legislative history, and gives examples of two cases that have been filed under the statute. Next, the Note discusses the necessity of postconviction, non-DNA innocence statutes. Finally, the Note discusses whether Utah’s statute should be the model for other states and what problems exist with Utah’s statute as written.<sup>6</sup>

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<sup>1</sup> John Eligon, *New Efforts Focus on Exonerating Prisoners in Cases Without DNA Evidence*, N.Y. TIMES, Feb. 8, 2009, at A26 (quoting Professor Daniel S. Medwed).

<sup>2</sup> Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1549 (2008) (“[I]nnocentrism, derives mainly from the emergence of DNA testing and the subsequent use of that technology to exonerate innocent prisoners.”).

<sup>3</sup> See *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Access\\_To\\_PostConviction\\_DNA\\_Testing.php](http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php) (last visited Apr. 7, 2013) (explaining that Oklahoma does not yet have a DNA statute incorporated into its state law).

<sup>4</sup> *Id.*

<sup>5</sup> See UTAH CODE ANN. § 78B-9-402 (LexisNexis 2012); VA. CODE ANN. § 19.2-327.10 (West 2007).

<sup>6</sup> The Note does not engage in a comparison of Utah’s statute to Virginia’s, instead the focus of this Note is Utah’s factual innocence statute.

## II. BACKGROUND OF DNA AND NON-DNA INNOCENCE

On August 14, 1989, Gary Dotson, who had spent ten years in prison and on parole for a rape conviction, became the first person exonerated by DNA evidence.<sup>7</sup> Since 1989, there have been 292 postconviction DNA exonerations in the United States—in thirty-six different states—and the exonerees have served approximately 3,839 years in prison, collectively.<sup>8</sup> Many different factors have been discussed as causes of wrongful convictions including: eyewitness misidentification, invalidated or improper forensic science, false confessions and incriminating statements, and criminal informants or “snitches.”<sup>9</sup> Additionally, ineffective assistance of defense counsel, incentives for prosecutors to win, and tunnel vision—which can each cause prosecutors and police to ignore exonerating evidence and other possible suspects—play a role in wrongful convictions.<sup>10</sup>

“DNA has undermined the concerns of finality and reliability [of convictions] . . . [because] pieces of stray evidence that would play at most a tangential role two decades ago—can now demonstrate guilt or innocence decades after a crime . . . .”<sup>11</sup> However, many issues exist with DNA evidence and its relation to innocence claims. First, few criminal investigations result in the collection of biological evidence.<sup>12</sup> Second, even if biological evidence is present at the beginning of the investigation, the evidence is often lost, destroyed, or degraded over time.<sup>13</sup> Third, “human error or misconduct can lead to unsound results or

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<sup>7</sup> Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005).

<sup>8</sup> For a current list of exonerated individuals see *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) (last visited Aug. 3, 2013); *Browse Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Aug. 3, 2013).

<sup>9</sup> *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Apr. 7, 2013).

<sup>10</sup> See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132–40 (2004).

<sup>11</sup> Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631 (2008).

<sup>12</sup> SEE, E.G., DANIEL S. MEDWED, *UP THE RIVER WITHOUT A PROCEDURE: INNOCENT PRISONERS AND NEWLY DISCOVERED NON-DNA EVIDENCE IN STATE COURTS*, 47 ARIZ. L. REV. 655, 656–57 (2005) (“EVIDENCE SUITABLE FOR DNA TESTING, HOWEVER, EXISTS ONLY IN A SMATTERING OF CRIMINAL CASES: AN ESTIMATED 80–90% OF CASES DO NOT HAVE ANY BIOLOGICAL EVIDENCE.”).

<sup>13</sup> *Id.*; *New York City Cases that Were Closed When Evidence Could Not Be Located at NYPDs Pearson Place Warehouse*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/New\\_York\\_City\\_Cases\\_that\\_Were\\_Closed\\_When\\_Evidence\\_Could\\_Not\\_Be\\_Located\\_at\\_NYPDs\\_Pearson\\_Place\\_Warehouse.php](http://www.innocenceproject.org/Content/New_York_City_Cases_that_Were_Closed_When_Evidence_Could_Not_Be_Located_at_NYPDs_Pearson_Place_Warehouse.php) (last visited Apr. 7, 2013) (“In New York City, 50% of cases the Innocence Project closed [between 1996 and 2006] were closed because of reports that evidence was lost or destroyed . . . at Pearson Place Warehouse.”); *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) (last visited Apr. 7, 2013).

analysis.”<sup>14</sup> Fourth, problems exist with the preservation of DNA evidence, as only about half the states have statutes that compel preservation and many states employ restrictions that result in large quantities of evidence being destroyed.<sup>15</sup> Finally, current DNA statutes contain hurdles for petitioners, including filing requirements, standards of proof, statutes of limitation, prerequisites to obtain testing, and so forth.<sup>16</sup>

Furthermore, because DNA technology has proven that mistakes are made, the testing of DNA evidence has now become a part of the investigation. Thus, the evidence weeds out the innocent suspects at the front end, reducing the number of wrongful convictions in cases where biological evidence is available.<sup>17</sup> Others worry that DNA will mislead courts and litigants into thinking that DNA evidence is the “only conclusive evidence of innocence.”<sup>18</sup> Moreover, DNA can lead to a “false promise of simplicity in assessing guilt and innocence . . . thereby threaten[ing] to undermine . . . the presumption of innocence.”<sup>19</sup>

Nevertheless, these issues only pertain to DNA cases. Non-DNA cases provide their own issues and challenges. Innocence claims in non-DNA cases are inherently more difficult to prove as they rely upon recantations, unreliable forensic science evidence, ineffective assistance of counsel, and prosecutorial conduct—none of which conclusively prove that the defendant is innocent.<sup>20</sup> Also, lawyers may be reluctant to take these cases because of their difficulty and expense, as they “often require cumbersome investigations, including finding and re-interviewing witnesses or poring over thick files to find anything vital that a trial lawyer might have missed.”<sup>21</sup> Finally, “even when crucial evidence is uncovered . . . judges, juries and prosecutors often treat it with skepticism.”<sup>22</sup>

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<sup>14</sup> Garrett, *supra* note 11, at 1648 (“A series of DNA laboratories have been investigated for systemic errors, and at least three individuals have been wrongly convicted based on faulty DNA testing or analysis.”).

<sup>15</sup> For further discussion of restrictions some preservation statutes contain and ideas about what should be contained in a preservation statute see *Preservation of Evidence, INNOCENCE PROJECT*, [http://www.innocenceproject.org/Content/Preservation\\_Of\\_Evidence.php](http://www.innocenceproject.org/Content/Preservation_Of_Evidence.php) (last visited Apr. 7, 2013).

<sup>16</sup> See Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 356–82 (2002) (discussing the basic parameters of the various DNA testing statutes, issues relating to the statutes, and how to expand the more confining language in the statutes); see also Garrett, *supra* note 11, at 1635.

<sup>17</sup> Medwed, *supra* note 2, at 1557; see also BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 323 (2003) (“[T]he era of DNA exonerations will come to an end. The population of prisoners who can be helped by DNA testing is shrinking, because the technology has been . . . clearing thousands of innocent suspects before trial.”).

<sup>18</sup> Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1188–89 (2011).

<sup>19</sup> *Id.* at 1189.

<sup>20</sup> *Id.* at 1161–62; see also Medwed, *supra* note 12, at 658–59.

<sup>21</sup> Eligon, *supra* note 1.

<sup>22</sup> *Id.*

Although non-DNA innocence is more difficult to prove, the number of non-DNA exonerations is now approaching the number of DNA exonerations.<sup>23</sup> Thus, DNA “no longer defines the Innocence Movement.”<sup>24</sup> The countless individuals claiming innocence, without DNA evidence, can no longer be overlooked. However, only Utah and Virginia have taken the ultimate step in enacting postconviction non-DNA innocence statutes.<sup>25</sup>

### III. OVERVIEW: UTAH'S POSTCONVICTION FACTUAL INNOCENCE STATUTE<sup>26</sup>

Utah, like many other states, took action as DNA testing became more prevalent in the criminal justice system. In 2001, Utah passed a bill entitled “Postconviction Testing of DNA,” which provided an avenue to seek exoneration through DNA technology.<sup>27</sup> For many years, however, Utah had only the appeals process by which innocent prisoners could be exonerated for reasons other than DNA.<sup>28</sup> Finally, in 2008, Utah passed the “Postconviction Determination of Factual Innocence” statute, which provided individuals, without DNA evidence, a way to prove their factual innocence. The statute “establishe[d] a two-step claim process: an individual must first petition the court for a hearing to determine factual innocence . . . and if the petition meets the requirements of section 78B-9-402, a hearing will be held at which the petitioner bears the burden of proving factual innocence by clear and convincing evidence.”<sup>29</sup>

The factual innocence statute is broken into five parts. Section 78B-9-401.5 contains definitions for important terms, including: “factual innocence,” and “newly discovered material evidence.” Section 78B-9-402 discusses the necessary petition requirements, steps to preserve evidence, and other general procedures for the court and petitioner. Additionally, “section 78B-9-402 establishes two tracks for obtaining a factual innocence hearing: one applicable to any person . . . convicted of a felony offense . . . and another for any person who has secured reversal or vacatur of [a] conviction and is not facing retrial or appeal.”<sup>30</sup> Section

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<sup>23</sup> Samuel R. Gross et al., *supra* note 7, at 524 (finding that out of 340 exonerations, 196 did not involve DNA; however, some of these exonerations were due to executive clemency or states that posthumously acknowledged the exoneree's innocence after the individual died in prison).

<sup>24</sup> Findley, *supra* note 18, at 1193; *see also* Medwed, *supra* note 2, at 1571 (“DNA exonerations are the tip of the innocence iceberg.”).

<sup>25</sup> This Note does not discuss Virginia's statute nor its related case law.

<sup>26</sup> UTAH CODE ANN. §§ 78B-9-401 to -405 (LexisNexis 2012).

<sup>27</sup> *Id.* §§ 78B-9-300 to -304.

<sup>28</sup> Creighton C. Horton II, *Legislative Update: Working Together for Justice: Utah's Exoneration and Innocence Assistance Bill*, 2008 UTAH L. REV. 107, 112.

<sup>29</sup> *Miller v. State*, 226 P.3d 743, 746–47 (Utah Ct. App. 2010).

<sup>30</sup> *Id.* at 749. After *Miller*, the statute changed so that an individual who already obtained postconviction relief now falls under subsection (5). Also the language “in the same form and manner as described above” was added in 2010 bringing into question the court's decision that a petition filed under (2)(b) is not constrained by the requirements of (2)(a).

78B-9-403 gives general information regarding appointment of counsel, the effectiveness of counsel, and appeals. Section 78B-9-404 provides information about the hearing, the burden of proof, and the court's determination and actions. Finally, section 78B-9-405 discusses the financial assistance provision. To better understand the importance of the statute this Note discusses the legislative history and the two cases that led to exoneration under the statute.

### A. Legislative History

The "Exoneration and Innocence Assistance" bill was first introduced during the 2006 General Session by Representative David Litvack, who had been contacted by a University of Utah law student worried about exonerees being released from prison with few resources and no financial assistance.<sup>31</sup> The bill had two major objectives: "to provide a mechanism for exoneration in non-DNA cases, and to provide some measure of restitution to those who have been wrongfully convicted and incarcerated."<sup>32</sup> Due to foreseeable problems, which gave the bill little chance to pass, Creighton Horton, then Assistant Attorney General for the State of Utah, suggested that Representative Litvack pull the bill and work with a committee to draft a new bill "that would accomplish the same major objectives, but have the support of the key players in the system."<sup>33</sup>

Soon after, a committee of innocence advocates and prosecutors formed and met regularly, discussing issues with the bill and its objectives.<sup>34</sup> The committee first drafted a process for prisoners without DNA evidence to petition a court for a finding of factual innocence, and then addressed the "innocence assistance" portion of the bill.<sup>35</sup> The new draft of the bill was presented in the 2007 General Session, sponsored by Representative Litvack.<sup>36</sup> The assistance provision raised many concerns for the legislators, including one individual who wanted to remove it entirely.<sup>37</sup> Thus, committee members had to work hard to demonstrate that the provision was not only fiscally conservative, but that Utah would ultimately spend less money by implementing the law.<sup>38</sup> The bill passed in the House by a margin of sixty-four to eight; however, it was near the end of the legislative session and the bill was not heard in the Senate.<sup>39</sup>

To prepare for the 2008 General Session, the bill was presented in 2007 to the Judiciary Interim Committee, who unanimously voted to pass the bill out favorably as a committee bill.<sup>40</sup> Senator Greg Bell sponsored the 2008 bill. It passed the

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<sup>31</sup> Horton, *supra* note 28, at 107.

<sup>32</sup> *Id.* at 107-08.

<sup>33</sup> *Id.* at 108.

<sup>34</sup> *Id.* at 108-09.

<sup>35</sup> *Id.* at 109.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 109-10.

<sup>39</sup> *Id.* at 110.

<sup>40</sup> *Id.*

Senate, was unanimously supported by the House Judiciary Standing Committee, and unanimously passed the House.<sup>41</sup> The bill became law on May 5, 2008, and has since been amended in 2009, 2010, and 2012.<sup>42</sup> Despite the amendments, the major objectives—providing an avenue for exonerations in non-DNA cases and providing financial assistance to exonerees—remain intact.<sup>43</sup>

### B. Case Examples: Two Exonerations Under the Statute

Since the factual innocence statute was passed in 2008, two individuals have been exonerated under the statute.<sup>44</sup> These exonerations depict both tracks for proving factual innocence.<sup>45</sup> The first person exonerated under the statute was Debra Brown, who followed the first track as she could not prove her factual innocence with DNA.<sup>46</sup> The second person exonerated was Harry Miller, who followed the second track as his charges had been previously dismissed before he filed his petition.<sup>47</sup> Further analysis of these cases will provide a greater understanding of the statute's importance.

#### 1. Debra Brown<sup>48</sup>

On the morning of November 7, 1993, Ms. Brown called 911 after finding her employer dead at his home. The victim had been shot in the head three times and was found in his bed with the sheets pulled up to his shoulders. Officers questioned Ms. Brown several times that day and searched her truck and purse. Ms. Brown stated that she had brought some soup to the victim the previous afternoon because he was ill, but after knocking on the door with no answer, she left the soup on the porch with a note. She returned the next morning to find the soup and note still on the porch and again knocked, but there was no response. She retrieved a key to the victim's home from her truck, let herself in, and found the victim.

After searching the victim's home, officers found that items were missing. They also found traces of blood around the kitchen sink and a small handprint on

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<sup>41</sup> *Id.* (“The bill went through the entire process, from introduction to passage, in less than three weeks, and was one of the first bills to pass during the 2008 session.”). One of the causes for the quick passage of the bill was the fact that the debate over the assistance portion changed to whether exonerees would receive enough assistance under the bill. *Id.*

<sup>42</sup> UTAH CODE ANN. §§ 78B-9-401 to -405 (LexisNexis 2012).

<sup>43</sup> Although a major objective and important part of the statute, the financial assistance portion is not the focus of this Note and will not be discussed further.

<sup>44</sup> See *Exonerated!*, INNOCENCE NEWS (Rocky Mountain Innocence Ctr., Salt Lake City, Utah), Fall 2011, at 1, 1, available at <http://rminnocence.org/wp-content/uploads/2011/07/RMIC-Fall-Newsletter-2011.pdf> [hereinafter RMIC Fall Newsletter].

<sup>45</sup> *Miller v. State*, 226 P.3d 743, 749 (Utah Ct. App. 2010).

<sup>46</sup> See RMIC Fall Newsletter, *supra* note 44.

<sup>47</sup> *Miller*, 226 P.3d at 745.

<sup>48</sup> The following facts were taken from *State v. Brown*, 948 P.2d 337, 339–45 (Utah 1997).

the front door. However, none of the missing items were found in Ms. Brown's possession, the handprint did not match Ms. Brown's, and no blood was found on her clothes. Further, Ms. Brown willingly cooperated with investigators, was interviewed more than twenty times in the three months of investigation, and consistently denied any involvement in the crime. She was charged with aggravated murder on September 12, 1994.

During trial the prosecution presented the following evidence: investigators determined there was no forced entry; only two keys existed to get in the home and Ms. Brown had one; tests revealed that the victim had been shot with a .22 caliber handgun and the victim owned a .22 caliber Colt Woodsman handgun that was missing; the medical examiner testified that the time of death was likely between 9:00 p.m. Friday, November 5, and 3:00 a.m. Sunday, November 7; a neighbor testified that she heard two "pops" that she believed were gunshots on Saturday morning around 7:00 a.m.;<sup>49</sup> several forged checks payable to Ms. Brown had cleared the bank in October, and some canceled checks and the victim's October 1993 bank statement were missing; bank representatives testified that the statement was mailed and the postmaster testified that it was 97% likely the victim had received the statement and canceled checks; and finally, Ms. Brown made an inconsistent statement about why she left the soup on the porch. No direct physical evidence linking Ms. Brown to the murder was ever discovered.<sup>50</sup>

On appeal, the Utah Supreme Court rejected Ms. Brown's arguments<sup>51</sup> because she failed to proffer evidence that polygraph examinations are reliable scientific evidence, she strategically chose not to object during the prosecutors closing arguments, and circumstantial evidence supported the jury's decision.<sup>52</sup> Ms. Brown did not appeal the Utah Supreme Court's decision.<sup>53</sup> In 2002, the Rocky Mountain Innocence Center began investigating Ms. Brown's case and in March of 2009 filed a petition under the Postconviction Remedies Act ("PCRA") and a petition for Postconviction Determination of Factual Innocence.<sup>54</sup> The State filed a motion for summary judgment as to the PCRA claim, which the court granted.<sup>55</sup>

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<sup>49</sup> The defense presented testimony from another neighbor who testified that he heard no gunshots that morning. But the defense was unable to establish Ms. Brown's whereabouts for the period between 6:40 a.m. and 10:00 a.m. on Saturday.

<sup>50</sup> *Brown*, 948 P.2d at 344 ("The State's case was based solely on circumstantial evidence.").

<sup>51</sup> *Id.* at 340–46 (arguing that the trial court erred in barring admission of the results of a polygraph examination showing she had been truthful, the trial court failed to intervene when the prosecutor made certain comments during closing arguments, and that the evidence was insufficient).

<sup>52</sup> *Id.*

<sup>53</sup> *State v. Brown*, No. 100903670, slip op. at 1–2 (Utah Dist. Ct., May 2, 2011).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2 n.1. Neither the State's motion nor the memorandum decision issued by the court addressed the petition for postconviction determination of factual innocence.

However, the factual innocence petition continued and in January 2011, the Second District Judicial Court held an evidentiary hearing.<sup>56</sup> Ms. Brown presented five pieces of “newly discovered” evidence, which she argued proved her factual innocence under the statute. The State argued that a rational basis still existed for the conviction, as the “newly discovered” evidence had not rebutted the evidence presented at trial.<sup>57</sup>

The five pieces of evidence that Ms. Brown presented are as follows. First, Logan City Police Department had information about another suspect. Second, a witness gave a statement identifying another suspect as the likely perpetrator.<sup>58</sup> Third, witness statements and police files showed that neighbors heard gunshots at times when Ms. Brown had a solid alibi and contrary to the time of death relied upon by the prosecution. Fourth, the October bank statement never arrived at the victim’s home, many people knew the victim had guns and large amounts of money, the home was not secure, and Ms. Brown was not the only person with a key.<sup>59</sup> Finally, police notes indicated that officers mishandled the crime scene, failed to collect important physical evidence and test blood evidence, and failed to properly follow up on leads.<sup>60</sup>

After the evidence was presented, the court found that the victim was alive in the afternoon on November 6, 1993.<sup>61</sup> Moreover, the court found that, because Ms. Brown established her whereabouts for Saturday afternoon and early Sunday morning, she could not have killed the victim during the time the murder likely occurred.<sup>62</sup> Therefore, the court concluded that Ms. Brown was factually innocent, and on May 9, 2011, after seventeen years, she walked out of prison and into the arms of family members and friends.<sup>63</sup>

On May 26, 2011, however, the State filed a notice of appeal and the Utah Supreme Court heard arguments on September 4, 2012. As expected, the main issue was whether the evidence proved Ms. Brown’s factual innocence.<sup>64</sup> The State argued that Ms. Brown did not establish that no reasonable trier of fact could find her guilty.<sup>65</sup> They stated that nothing corroborated the statements made by another witness about seeing the victim alive at a time that contradicted the time of death

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<sup>56</sup> *Id.* at 3 (discussing reopening the case to receive additional testimony on certain items of evidence and taking the case under advisement at the conclusion of the evidentiary hearing on March 7, 2011).

<sup>57</sup> *Id.* at 4–6.

<sup>58</sup> *Id.* at 4–5.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 45.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; see RMIC Fall Newsletter, *supra* note 44.

<sup>64</sup> Oral Argument, *Brown v. State*, 2013 WL 3486849 (Utah, July 12, 2013) (No. 20110481), available at <http://www.utcourts.gov/courts/sup/streams/index.cgi?mon=20129> (follow the “listen” link for “Session 1” on Sept. 4, 2012, at the bottom of the page).

<sup>65</sup> *Id.* at 11:21–11:37.

asserted at trial.<sup>66</sup> Additionally, they argued that the evidence needed to prove innocence must be *substantial* newly discovered evidence and cannot be old evidence.<sup>67</sup> Ms. Brown argued that the newly discovered evidence proved that the victim could not have been killed during the time the State argued he had.<sup>68</sup> Further, she argued that it would be wrong to ignore previously known or old evidence in a determination of factual innocence.<sup>69</sup>

During oral arguments, Justice Lee questioned Ms. Brown's alibi, with the State arguing that she put herself at the crime scene and had not shown that she did not kill the victim at any other time.<sup>70</sup> Justice Parrish and Justice Durham questioned the State changing its theory as to the time of death stating that it would be unfair for the State to shift the time frame now because they made the time of death an element of the crime at trial when they asked for the alibi instruction.<sup>71</sup> Finally, Justice Durham pointed out that the State did not prove that Ms. Brown was the only one who could have committed the crime.<sup>72</sup> On July 12, 2013, the Utah Supreme Court affirmed the post-conviction court's determination of Ms. Brown's factual innocence.<sup>73</sup> The court has yet to render a decision and, based on the arguments, it is difficult to say how the court will rule. The court's ruling, whatever it may be, will likely affect the factual innocence statute and petitions going forward.

## 2. *Harry Miller*

Mr. Miller was arrested in 2003 and was convicted for aggravated robbery. At trial, Mr. Miller argued that he was at home in Louisiana at the time of the crime; however, no witnesses testified to corroborate his story. On appeal, Mr. Miller argued ineffective assistance of counsel because counsel failed to obtain alibi witnesses. The court granted Mr. Miller's motion for remand and instructed the district court to conduct a hearing. On remand, the district court determined Mr. Miller's trial counsel did not act deficiently because Mr. Miller did not provide information to locate any alibi witnesses. The court also found that, even if counsel was ineffective, Mr. Miller was not prejudiced, as additional evidence of alibi would not have affected the outcome. The court then returned the case to the court of appeals.

Before arguments, however, the parties filed a stipulated motion for summary reversal of Mr. Miller's conviction and requested a new trial in the interest of

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<sup>66</sup> *See id.* at 8:15–9:10, 10:00–10:15.

<sup>67</sup> *Id.* at 42:10–43:29.

<sup>68</sup> *Id.* at 18:25–21:54.

<sup>69</sup> *Id.* at 17:30–18:25.

<sup>70</sup> *Id.* at 11:58–13:28, 25:36–26:22.

<sup>71</sup> *Id.* at 44:09–46:04.

<sup>72</sup> *Id.* at 47:09–47:46.

<sup>73</sup> *Brown v. State*, 2013 UT 42, ¶ 2.

justice. The court of appeals granted the motion and remanded for a new trial.<sup>74</sup> Mr. Miller's retrial never happened because, prior to the new trial, prosecutors filed a motion to dismiss the charges and Mr. Miller was released from custody nearly four and half years after his arrest.<sup>75</sup>

Mr. Miller then filed a petition to determine his factual innocence pursuant to the statute.<sup>76</sup> The State opposed the petition for three reasons. First, the petition "did not allege facts sufficient to meet the statutory requirements . . . particularly because the petition failed to identify newly discovered evidence or evidence that was not cumulative of evidence presented at trial."<sup>77</sup> Second, "the combination of evidence supporting the petition does not lead to a determination of Miller's factual innocence."<sup>78</sup> Third, Mr. Miller's "trial counsel was not ineffective."<sup>79</sup> Mr. Miller argued his petition was appropriate because of his alibi, because certain "statutory requirements could be waived 'in the interest of justice,'" and because the facts—as a whole—showed his factual innocence.<sup>80</sup> The trial court determined that Mr. Miller's petition failed to satisfy the statutory requirements under section 78B-9-402(2)(a) of the Utah Code and thus granted the State's motion to dismiss.<sup>81</sup> Mr. Miller appealed the court's decision.<sup>82</sup>

On appeal, the court found that two tracks existed under the statute to prove factual innocence, and a petition filed under then subsection 2(b) did not need to meet the statutory requirements of subsection 2(a).<sup>83</sup> The court also discussed the new evidence obtained regarding the alibi defense.<sup>84</sup> This evidence showed (1) Mr. Miller was hospitalized in Louisiana on November 25, 2000, after having a stroke, (2) he was released three days later to his sister, and (3) he was provided with a home health care nurse.<sup>85</sup> Mr. Miller's employment records "show[ed] that he was absent from work for medical reasons from November 25 through December 13, 2000."<sup>86</sup> An affidavit from a registered nurse, who provided home health care to Mr. Miller, stated that she visited him on December 7, 2000, and again on December 14, 2000. Finally, the nurse's assessment on December 14, stated Mr. Miller was "[a]ble to ride in a car only when driven by another person OR able to

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<sup>74</sup> The preceding and following facts were taken from *Miller v. State*, 226 P.3d 743, 745–51 (Utah Ct. App. 2010). The appellate court did not review the trial court's findings regarding ineffectiveness of Mr. Miller's trial counsel. *See id.*

<sup>75</sup> *Id.* at 745.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 746.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (quoting UTAH CODE ANN. § 78B-9-402(2)(a)(vi)(C) (LexisNexis Supp. 2010) (amended in 2010 and repealed by Factual Innocence Amendments, 2012 Utah Laws 896)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 749.

<sup>84</sup> *Id.* at 750.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

use a bus or handicap van only when assisted or accompanied by another person.”<sup>87</sup>

Based on the new evidence, the court concluded that Mr. Miller raised a bona fide issue of factual innocence. It found that his stroke limited his physical mobility, and testimony indicated he “had only slightly more than twenty-four hours to fly from . . . Louisiana to Utah in order to commit an act of physical violence against a complete stranger.”<sup>88</sup> Thus, the court reversed and remanded so that Mr. Miller could receive a factual innocence hearing.<sup>89</sup> With the new evidence supporting his alibi, state officials agreed to Mr. Miller’s exoneration.<sup>90</sup> On September 12, 2011, the court “pronounced Mr. Miller factually innocent and ordered the state to give him financial assistance payments for the years he spent wrongly imprisoned.”<sup>91</sup>

#### IV. THE NECESSITY OF NON-DNA FACTUAL INNOCENCE STATUTES

Debra Brown and Harry Miller are examples of individuals who did not have DNA evidence, but had other evidence that proved their innocence. Fortunately, Utah has a non-DNA factual innocence statute that provided an avenue leading to the determination that they are factually innocent.<sup>92</sup> Only two states, however, have a non-DNA statute.<sup>93</sup> Nevertheless, each state provides other avenues for postconviction relief without DNA.<sup>94</sup> Thus, do other states really need postconviction non-DNA factual innocence statutes? To answer this question this Note will discuss other forms of postconviction relief offered to individuals claiming innocence.

Professor Daniel Medwed stated “more than ever . . . state post-conviction procedures comprise the most appropriate vehicle to rectify wrongful convictions and a subset of those procedures, the rules concerning newly discovered evidence, have the potential to operate as the principal engine driving cases toward fair resolutions.”<sup>95</sup> Innocent prisoners seeking post-conviction relief still have other mechanisms for obtaining relief; however, it is difficult for those without DNA

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 751.

<sup>90</sup> See RMIC Fall Newsletter, *supra* note 44.

<sup>91</sup> *Id.*

<sup>92</sup> Utah has other avenues of obtaining postconviction relief including motions for new trial with newly discovered evidence and the PCRA; however, like other postconviction claims, these impose strict requirements, a statute of limitations, and do not deem the individual “factually innocent.” See UTAH R. CRIM. P. 24; UTAH CODE ANN. §§ 78B-9-101 to -110 (LexisNexis 2012).

<sup>93</sup> See *supra* note 5 and accompanying text.

<sup>94</sup> See *id.* at 675.

<sup>95</sup> *Id.* at 718.

evidence, as many roadblocks exist.<sup>96</sup> Two frequently used postconviction innocence claims include ineffective assistance of counsel claims and Brady claims.<sup>97</sup> Ineffective assistance of counsel claims most often center on defense counsel's failure to do something that would have supported the defendant's innocence.<sup>98</sup> A Brady claim argues that the prosecution withheld evidence that would have supported an innocence claim.<sup>99</sup> Under either claim, the defense bears the burden of establishing that the evidence might have made a difference in the outcome of the case.<sup>100</sup> Although these claims provide an avenue to postconviction relief, "their prejudice and materiality components act as constraints on, rather than paths to, vindication."<sup>101</sup> Moreover, even if the defendant meets the burden, the prosecution can retry the defendant.<sup>102</sup>

Postconviction relief can also be obtained through newly discovered evidence claims in "a mélange of direct and collateral remedies: motions for a new trial, procedures created by statutes and court rules in the nature of *coram nobis*, applications for common law *coram nobis* relief, and . . . habeas corpus petitions."<sup>103</sup> In seeking such relief, however, prisoners encounter many procedural limitations including statute of limitations, restrictions on the forum, and limitations on appellate review.<sup>104</sup> Also, "state courts have traditionally viewed newly discovered evidence claims with disdain, fearing the impact of such

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<sup>96</sup> See Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1440 (2007) ("[D]efendants face an uphill battle in non-DNA cases . . . . This intrinsic difficulty is aggravated by . . . burdensome state court procedures that ultimately fail to provide potentially innocent defendants with adequate access to the courts.").

<sup>97</sup> See *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); Findley, *supra* note 18, at 1194. Others, however, argue that individuals who obtain relief from these claims should not be called innocent "when all they managed to do was wriggle through some procedural cracks in the justice system." Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 508 (2005).

<sup>98</sup> Findley, *supra* note 18, at 1194.

<sup>99</sup> *Id.*

<sup>100</sup> See *id.* ("The Supreme Court has made it clear that this . . . standard requires a lesser showing: that the error 'undermine[s] confidence in the outcome.'" (alteration in original)); see also *Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that . . . the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

<sup>101</sup> Findley, *supra* note 18, at 1195.

<sup>102</sup> *Id.*

<sup>103</sup> Medwed, *supra* note 12, at 675; see *id.* at 664–86 (discussing the history of these remedies and current direct and collateral relief based on newly discovered evidence through a motion for a new trial or through the procedures of *coram nobis* and habeas corpus).

<sup>104</sup> See *id.* at 683–86 (discussing statutes of limitation, forum issues, and limited appellate review); see also *id.* at 717 ("[T]he rising number of procedural hurdles prisoners must overcome to obtain relief . . . through a writ of habeas corpus has made that option effectively unavailable.").

claims . . . , and harboring doubts about the underlying validity of new evidence.”<sup>105</sup> Furthermore, “standards for granting relief based on newly discovered evidence vary from jurisdiction to jurisdiction . . . .”<sup>106</sup> Usual standards “involve . . . showing[] that the new evidence could not have been discovered prior to trial with the exercise of reasonable diligence; that the evidence is relevant and not cumulative or merely impeaching; and that the new evidence creates a sufficient probability of a different result at a new trial.”<sup>107</sup>

Some states have created measures to remedy the difficulty of state postconviction relief based on new evidence of innocence and permit innocent individuals to obtain an official declaration of innocence through judicial findings.<sup>108</sup> In Illinois, an exonerated person may seek a “certificate of innocence” from the court.<sup>109</sup> In North Carolina, a three-judge panel decides whether the person has proven innocence by clear and convincing evidence.<sup>110</sup> But these statutes contain rather strict criteria for proving innocence and are “grossly under-inclusive, because of the high burden of proof they impose.”<sup>111</sup> Many factually innocent individuals will lack the resources and evidence to prove their innocence years after the crime.<sup>112</sup>

Finally, individuals can attempt to seek relief through direct appeals, parole, or executive clemency. But direct appeals are not always successful. Various hurdles—such as trial court discretion and the defendant’s burden—make it difficult to obtain relief. Parole is not always a feasible solution as parole boards customarily require a showing of remorse, “which puts actually innocent prisoners in a Catch-22: continue to proclaim innocence or boost the chances for parole by ‘admitting’ guilt.”<sup>113</sup> Finally, obtaining executive clemency is rare and may be more politically motivated than aimed at correcting the injustice of wrongful convictions.<sup>114</sup>

With the majority of cases lacking DNA evidence, there are many individuals in prison who are claiming innocence but who do not have DNA evidence. They could turn to the other postconviction procedures for relief, but they are most likely unattainable due to the many roadblocks and difficulties. Thus, “the innocence movement must capitalize on this unique epoch in the history of criminal law by encouraging the passage of legislation structured to limit wrongful convictions in

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<sup>105</sup> *Id.* at 664–65 (citations omitted).

<sup>106</sup> Findley, *supra* note 18, at 1197.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1198–1200.

<sup>109</sup> See 735 ILL. COMP. STAT. ANN. 5/2-702 (West 2011).

<sup>110</sup> See N.C. GEN. STAT. § 15A-1469(h) (2011).

<sup>111</sup> Findley, *supra* note 18, at 1200.

<sup>112</sup> *Id.*

<sup>113</sup> Medwed, *supra* note 12, at 717.

<sup>114</sup> *Id.*

non-DNA cases.”<sup>115</sup> States need to adopt some form of postconviction non-DNA statute, similar to Utah’s statute, to allow the innocent without the benefit of DNA evidence an avenue and a chance to prove their factual innocence.

#### V. UTAH’S CURRENT STATUTE AS A MODEL FOR OTHER STATES

Having determined that states should adopt postconviction non-DNA factual innocence statutes, should they use Utah’s as a model? With only two postconviction non-DNA factual innocence statutes currently enacted, states do not have a wide variety of examples to guide them in drafting similar statutes.<sup>116</sup> Furthermore, the Utah and Virginia statutes differ in various aspects, with the latter lacking clear definitions, requiring more content in the petition, and applying a different standard for the courts’ determination.<sup>117</sup> Thus, in keeping with the goal of providing a chance at postconviction relief for those who do not have DNA evidence, Utah’s statute provides a fairer avenue to obtain relief. But issues and concerns still exist with Utah’s statute.<sup>118</sup>

The first major issue is with the requirement for “newly discovered evidence.” The statute does not give courts direction as to whether a finding of factual innocence must be based exclusively on newly discovered evidence or a combination of new and old evidence.<sup>119</sup> Often the newly discovered evidence relates to evidence already presented at trial. Thus, if the court cannot consider that evidence, it likely will be difficult for someone to prove factual innocence. Some argue that the goal is to determine innocence and so we should look at all the evidence regardless of whether it is old or new evidence.<sup>120</sup> But allowing the petitioner to essentially reopen the case may prove problematic. Many years have likely passed since trial, thus, investigators and witnesses may not be available or remember anything, and other evidence may have been lost or destroyed. This was one of the main issues set forth before the Utah Supreme Court in *Ms. Brown’s* case. The old evidence in *Ms. Brown’s* case was necessary to corroborate her story and prove her innocence. Without that evidence, it is likely she would still be sitting in a jail cell today. In its decision, the Utah Supreme Court concluded that

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<sup>115</sup> Medwed, *supra* note 2, at 1571; *see also id.* (“Innocentric arguments should be reconfigured . . . away from DNA cases and toward those cases bereft of the magic bullet of science.”).

<sup>116</sup> *See supra* note 5 and accompanying text.

<sup>117</sup> *See* VA. CODE ANN. §§ 19.2-327.10 to -327.14 (West 2007).

<sup>118</sup> Email from Patrick Nolan, Assistant Utah Att’y Gen., Utah Att’y General’s Office, to Author (June 29, 2012, 08:45 MST) (“[A]mendments to the statute . . . tightened some things up. There is, however, an increasing sense of frustration among the county attorneys over this statute.”) (on file with author).

<sup>119</sup> *See* *State v. Brown*, No. 100903670, slip op. at 16, 20–21 (Utah Dist. Ct., May 2, 2011) (holding that a court can base its determination either solely on new evidence or a combination of both old and new evidence).

<sup>120</sup> Interview with Jensie Anderson, Clinical Professor, S.J. Quinney College of Law, in Salt Lake City, Utah (Aug. 1, 2012).

the plain language of the statute allows a determination of factual innocence based on both old and new evidence.<sup>121</sup> Thus, barring a statutory amendment, the court has answered this question concerning newly discovered evidence.

Another concern surrounds the financial assistance for exonerees. Fortunately, Utah's statute does have a compensation provision. Issues arise, however, as to whether the amount given to the innocent individual is enough and also whether the statute should provide access to job training and educational, health, and legal services after an innocent person's release. Some suggested additions to the statute include providing exonerees with help securing affordable housing, medical, dental, and counseling services.<sup>122</sup> Additionally, Professor Jensie Anderson<sup>123</sup> found issue with not awarding financial payments if the finding of factual innocence occurs after the death of the petitioner.<sup>124</sup> She discussed the toll on the families of those individuals, who are victims and should be compensated for the loss of that individual from their lives during the time spent in prison.<sup>125</sup>

Exonerated individuals often spend many years in prison, losing income and the opportunity to gain experience, skills, and job training. This makes it difficult for them to obtain employment upon release. Without adequate compensation and assistance via job training and other services, exonerees are unlikely to be able to provide for themselves or their families. Compensation and payment for services will likely have to come from the state or county that prosecuted the individual. This will take money away from county or state prosecutor offices, which means less money to assist those offices in investigating and prosecuting crimes, causing them to fight "innocence" petitions even more aggressively than they currently do.<sup>126</sup>

Professor Anderson has raised additional issues. First, many have argued that there should be a one-year statute of limitations, as exists in the PCRA.<sup>127</sup> Professor Anderson stated that the problem with this is that cases take years to investigate, and if there were a one-year limitation, it would put another procedural hurdle in the way of innocence petitioners—one that would prevent cases from

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<sup>121</sup> *Brown v. State*, 2013 UT 42, ¶ 45.

<sup>122</sup> See AN ACT CONCERNING CLAIMS FOR WRONGFUL CONVICTION AND IMPRISONMENT § 4 (Innocence Project, Inc. 2010), available at [http://www.innocenceproject.org/docs/model/Compensation\\_Model\\_Bill.pdf](http://www.innocenceproject.org/docs/model/Compensation_Model_Bill.pdf).

<sup>123</sup> Professor Jensie Anderson is the clinical professor at the S.J. Quinney College of Law in charge of the Innocence Clinic and is a member of the Board of Directors for the Rocky Mountain Innocence Center.

<sup>124</sup> Interview with Jensie Anderson, *supra* note 120; see also UTAH CODE ANN. § 78B-9-402(14) (LexisNexis 2012) ("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.").

<sup>125</sup> Interview with Jensie Anderson, *supra* note 120.

<sup>126</sup> See Medwed, *supra* note 10, at 127–30 (discussing various ways in which prosecutors resist "legitimate post-conviction innocence claims").

<sup>127</sup> Interview with Jensie Anderson, *supra* note 120.

being filed.<sup>128</sup> Similar to allowing a court to consider old evidence, however, if too many years pass it may be difficult to locate witnesses and other evidence, even without a statute of limitations. Professor Anderson also discussed the problem that the statute allows the State to file for summary judgment at any point during the proceedings if the State believes the material facts are undisputed. But petitioners cannot file for summary judgment at all, even if the newly discovered evidence overwhelmingly proves their innocence.<sup>129</sup>

Professor Anderson further discussed the “knowledge of the evidence” standard.<sup>130</sup> She stated it is difficult to meet that standard, as the State can argue that most anything could have been discovered through reasonable due diligence.<sup>131</sup> She discussed that often the petitioner’s trial counsel decided not to follow up on a certain piece of evidence for tactical reasons and that evidence ends up proving the person’s innocence.<sup>132</sup> Her final concern related to the amount of legislation regarding the statute.<sup>133</sup> She stated that if the legislature continues to chip away at the statute and create more procedural roadblocks, the statute will become unworkable.<sup>134</sup>

Other issues concern the application of the statute. Patrick Nolan<sup>135</sup> argued that “we have yet to see consistent and critical preliminary review of these petitions by the courts on the front end.”<sup>136</sup> To clarify this statement he explained, “The courts seem to be far too willing to take the petitions at face value, without analysis as to whether there actually exists newly discovered material evidence of factual innocence; and seem to be unwilling to dismiss frivolous petitions.”<sup>137</sup> Additionally, Mr. Nolan argued that the courts have been reluctant to dismiss the petitions summarily, and they have a tendency to grant the petitioner a hearing, even when the law clearly supports a summary conclusion to the litigation.<sup>138</sup>

However, two recent district court opinions show that judges are following the statute and dismissing petitions that do not meet the requirements under the statute. In one case the petitioner relied solely on the recantation of the victim and

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*; see UTAH CODE ANN. § 78B-9-402(3)(a)(i) (LexisNexis 2012) (requiring petitioner to assert that “neither the petitioner nor petitioner’s counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner’s counsel through the exercise of reasonable diligence”).

<sup>131</sup> Interview with Jensie Anderson, *supra* note 120.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Patrick Nolan is the former Assistant Utah Attorney General who had dealt with every factual innocence petition filed in Utah at the time of the writing of this Note.

<sup>136</sup> Email from Patrick Nolan, *supra* note 118.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

two other submitted statements.<sup>139</sup> The court applied section 78B-9-402(4) of the Utah Code and dismissed the petition, as it was based solely on the alleged (and at best equivocal) recantation of the victim.<sup>140</sup> The other case also involved a recantation. Only one of the victims recanted, however.<sup>141</sup> That court, also relying on section 78B-9-402(4) of the Utah Code, dismissed the petition because the recantation was not credible given the prior testimony of both victims and the other victim reaffirmed her testimony.<sup>142</sup> Both of these cases show that judges, at the preliminary stages, are following the statute and dismissing cases that do not establish a “bona fide and compelling issue of factual innocence.”<sup>143</sup>

In addition to Professor Anderson’s and Mr. Nolan’s concerns, other issues remain. First, no definition, or case law for that matter, defines “reasonable diligence” as it applies to the knowledge standard of newly discovered evidence.<sup>144</sup> Another concern surrounds the “clear and convincing” standard.<sup>145</sup> Proponents of the innocence movement would likely find that this standard is too high, seriously limiting petitions. Opponents likely take the opposite stance, however, and believe the standard should be higher, similar to how prosecutors must prove guilt beyond a reasonable doubt. Also, the statute diminishes a petition based solely on recantation testimony.<sup>146</sup> There has yet to be a definition of what is equivocal or self-serving and how that is determined.<sup>147</sup> Also, although recantations are not the strongest piece of evidence as they inherently carry a credibility issue, the statute diminishes their value outright and essentially pushes judges to dismiss them or at the very least not pay attention to them.

On the other hand, the Utah statute is also very advantageous to petitioners. First, it allows the court to review “evidence that was suppressed or would be suppressed at a criminal trial,” “hearsay evidence,” and “the record of the original criminal case and at any postconviction proceedings in the case.”<sup>148</sup> Second, it contains no statute of limitations, allowing petitioners time to locate and review documents and talk to witnesses. Third, not only can an incarcerated individual take advantage of the statute, but also those who may have already had their charges reversed or vacated. Finally, and most importantly, the statute allows an

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<sup>139</sup> See *State v. Myers*, No. 120100270, slip op. at 1–2 (Utah Dist. Ct., Oct. 4, 2012).

<sup>140</sup> *Id.* at 3. (finding the alleged recantations were qualified with statements from the victim such as “I forgive him” and “everybody deserves a second chance” and that “the alleged recantation was not signed under penalty of perjury while the victim’s prior statements were”).

<sup>141</sup> See *State v. Wamsley*, No. 120409899, slip op. at 2 (Utah Dist. Ct., Oct. 11, 2011).

<sup>142</sup> *Id.*

<sup>143</sup> UTAH CODE ANN. § 78B-9-402(9)(c) (NexisLexis 2012).

<sup>144</sup> See *id.* § 78B-9-402(3)(a)(i) (requiring, but failing to define, knowledge and “reasonable diligence”).

<sup>145</sup> *Id.* § 78B-9-404(1)(b).

<sup>146</sup> See *id.* § 78B-9-402(4).

<sup>147</sup> See *State v. Myers*, No. 120100270 (Utah Dist. Ct., Oct. 4, 2012); *Wamsley*, No. 120409899 (Utah Dist. Ct., Oct. 11, 2011).

<sup>148</sup> *Id.* § 78B-9-404(2)–(3).

innocent prisoner who has other non-DNA evidence a chance to be found factually innocent.

Utah's current non-DNA statute is not perfect and, like most controversial issues, the "factual innocence" statute has two sides. Thus, it is difficult to say whether Utah's current statute should be the model for other states, but it is definitely a good place to start. Certainly, changes could be made and only time will tell if the issues surrounding the statute will be resolved. There is no question that the ideal statute would be fair to both sides, giving each a chance to prove whether a person is truly innocent. In its current format, however, the factual innocence statute appears to be close to "a satisfactory balance between finality and efficiency, on the one hand, and justice for the actually innocent on the other."<sup>149</sup>

## VI. CONCLUSION

Since 1989, DNA evidence has fueled the innocence movement, helping hundreds prove their innocence and obtain freedom. DNA technology has been an invaluable development for the innocence movement, and DNA technology will continue to advance and improve in the future. DNA evidence is not available in the majority of cases, however, and many believe that DNA exonerations will eventually diminish as DNA analysis becomes more widely available. Furthermore, "for every DNA exoneree there are hundreds if not over a thousand wrongfully convicted defendants whose cases do not contain biological evidence that could prove innocence."<sup>150</sup> It is time for other states to follow Utah's lead and adopt a postconviction non-DNA statute to provide a better avenue for innocent individuals who do not have DNA evidence. It is time to give them a chance to tell their stories of innocence.

Debra Brown and Harry Miller were both charged and convicted of crimes they did not commit. They both went down the road of appeals and were met with utter disappointment as their convictions were upheld. Fortunately for them, the factual innocence statute provided a different route that, although difficult, gave them a chance to tell their stories of innocence and walk away factually innocent of the crimes they were charged with. They, like most of us, likely never expected something like that to happen to them. However, as Professor Medwed stated, "it could really happen to anybody."<sup>151</sup> When it does happen again and there is no DNA evidence, hopefully, for the individual wrongfully convicted, a postconviction non-DNA statute similar to Utah's will be available to prove the accused's factual innocence.

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<sup>149</sup> Medwed, *supra* note 12, at 687.

<sup>150</sup> Glenn A. Garber & Angharad Vaughan, *Actual-Innocence Policy, Non-DNA Innocence Claims*, N.Y. L.J., April 4, 2008, at 4.

<sup>151</sup> Eligon, *supra* note 1, at 26.