

ASSEMBLY BILL NO. 356—ASSEMBLYMAN MCCURDY

MARCH 19, 2019

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing criminal procedure.
(BDR 14-863)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

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EXPLANATION - Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to criminal procedure; establishing provisions relating to the filing of a petition for a hearing to establish the factual innocence of a person based on newly discovered evidence; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law authorizes a court to grant a new trial to a defendant on the ground of newly discovered evidence, but generally provides that a motion for a new trial based on such a ground must be made within 2 years after the verdict or finding of guilt. (NRS 176.515) **Section 11** of this bill removes such provisions, and **sections 2-9** of this bill establish provisions relating to the filing of a petition for a hearing to establish the factual innocence of a person based on newly discovered evidence.

Section 6 of this bill authorizes a person who has been convicted of a felony to file a petition for a hearing to establish the factual innocence of the person based on newly discovered evidence in the district court of the county in which the person was convicted and sets forth certain requirements relating to the contents of such a petition. **Section 6** requires the court to review such a petition to determine whether the petition satisfies the necessary requirements. **Section 7** of this bill: (1) provides that if the court does not dismiss the petition after the court’s review, the court is required to order the district attorney to file a response to the petition; and (2) authorizes the petitioner to reply to the district attorney’s response. **Section 7** also provides that if the court determines that the petition satisfies all requirements and that there is a bona fide issue of factual innocence regarding the charges of which the petitioner was convicted, the court is required to order a hearing on the petition. **Section 7** further provides that if the factual innocence of the petitioner is established, the court is required to: (1) vacate the petitioner’s conviction and issue an order of factual innocence and exoneration; and (2) order the sealing of all records of criminal proceedings relating to the case.

Section 8 of this bill authorizes the court to appoint counsel for an indigent petitioner if the court grants a hearing on a petition filed pursuant to **section 6**, and



25 **section 9** of this bill requires the district attorney to make reasonable efforts to
26 provide notice to any victim of the crime for which the petitioner was convicted
27 that a petition has been filed.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Chapter 176 of NRS is hereby amended by adding
2 thereto the provisions set forth as sections 2 to 9, inclusive, of this
3 act.

4 **Sec. 2.** *As used in sections 2 to 9, inclusive, of this act, unless*
5 *the context otherwise requires, the words and terms defined in*
6 *sections 3, 4 and 5 of this act have the meanings ascribed to them*
7 *in those sections.*

8 **Sec. 3.** *“Bona fide issue of factual innocence” means that*
9 *newly discovered evidence presented by the petitioner, if credible,*
10 *would clearly establish the factual innocence of the petitioner.*

11 **Sec. 4.** *“Factual innocence” means that a person did not:*
12 *1. Engage in the conduct for which he or she was convicted;*
13 *2. Engage in conduct constituting a lesser included or*
14 *inchoate offense of the crime for which he or she was convicted;*
15 *and*

16 *3. Commit any other crime arising out of or reasonably*
17 *connected to the facts supporting the indictment or information*
18 *upon which he or she was convicted.*

19 **Sec. 5.** *“Newly discovered evidence” means evidence that*
20 *was not available to a petitioner at trial or during the resolution by*
21 *the trial court of any motion to withdraw a guilty plea or motion*
22 *for new trial and which is relevant to the determination of the*
23 *issue of factual innocence, including, without limitation:*

24 *1. Evidence that was discovered before or during the course*
25 *of any appeal or postconviction proceeding that served in whole or*
26 *in part as the basis to vacate or reverse the petitioner’s conviction;*

27 *2. Evidence that supports the claims within a postconviction*
28 *petition for a writ of habeas corpus that is pending at the time of*
29 *the court’s determination of factual innocence pursuant to*
30 *sections 2 to 9, inclusive, of this act; or*

31 *3. Relevant forensic scientific evidence that was not available*
32 *at the time of trial or during the resolution by the trial court of any*
33 *motion to withdraw a guilty plea or motion for new trial, or that*
34 *undermines forensic scientific evidence presented at trial.*
35 *Forensic scientific evidence is considered to be undermined if new*
36 *research or information exists that repudiates the foundational*
37 *validity of scientific evidence or testimony or the applied validity of*
38 *a scientific method or technique. As used in this subsection:*



1 (a) "Applied validity" means the reliability of a scientific
2 method or technique in practice.

3 (b) "Foundational validity" means the reliability of a scientific
4 method to be repeatable, reproducible and accurate in a scientific
5 setting.

6 **Sec. 6. 1.** A person who has been convicted of a felony may
7 petition the district court in the county in which the person was
8 convicted for a hearing to establish the factual innocence of the
9 person based on newly discovered evidence. A person who files a
10 petition pursuant to this subsection shall serve notice and a copy
11 of the petition upon the district attorney of the county in which the
12 conviction was obtained and the Attorney General.

13 2. A petition filed pursuant to subsection 1 must contain an
14 assertion of factual innocence under oath by the petitioner and
15 must aver, with supporting affidavits or other credible documents,
16 that:

17 (a) Newly discovered evidence exists that, if credible,
18 establishes a bona fide issue of factual innocence;

19 (b) The newly discovered evidence identified by the petitioner:

20 (1) Establishes innocence and is material to the case and
21 the determination of factual innocence;

22 (2) Is not merely cumulative of evidence that was known, is
23 not reliant solely upon recantation of testimony by a witness
24 against the petitioner and is not merely impeachment evidence;
25 and

26 (3) Is distinguishable from any claims made in any
27 previous petitions;

28 (c) If some or all of the newly discovered evidence alleged in
29 the petition is a biological specimen, that a genetic marker
30 analysis was performed pursuant to NRS 176.0918, 176.09183 and
31 176.09187 and the results were favorable to the petitioner; and

32 (d) When viewed with all other evidence in the case, regardless
33 of whether such evidence was admitted during trial, the newly
34 discovered evidence demonstrates the factual innocence of the
35 petitioner.

36 3. In addition to the requirements set forth in subsection 2, a
37 petition filed pursuant to subsection 1 must also assert that:

38 (a) Neither the petitioner nor the petitioner's counsel knew of
39 the newly discovered evidence at the time of trial or sentencing or
40 in time to include the evidence in any previously filed post-trial
41 motion or postconviction petition, and the evidence could not have
42 been discovered by the petitioner or the petitioner's counsel
43 through the exercise of reasonable diligence; or



1 (b) A court has found ineffective assistance of counsel for
2 failing to exercise reasonable diligence in uncovering the newly
3 discovered evidence.

4 4. The court shall review the petition and determine whether
5 the petition satisfies the requirements of subsection 2. If the court
6 determines that the petition:

7 (a) Does not meet the requirements of subsection 2, the court
8 shall dismiss the petition without prejudice, state the basis for the
9 dismissal and send notice of the dismissal to the petitioner, the
10 district attorney and the Attorney General.

11 (b) Meets the requirements of subsection 2, the court shall
12 determine whether the petition satisfies the requirements of
13 subsection 3. If the court determines that the petition does not
14 meet the requirements of subsection 3, the court may:

15 (1) Dismiss the petition without prejudice, state the basis
16 for the dismissal and send notice of the dismissal to the petitioner,
17 the district attorney and the Attorney General; or

18 (2) Waive the requirements of subsection 3 if the court
19 finds the petition should proceed to a hearing and that there is
20 other evidence that could have been discovered through the
21 exercise of reasonable diligence by the petitioner or the
22 petitioner's counsel at trial, and the other evidence:

23 (I) Was not discovered by the petitioner or the
24 petitioner's counsel;

25 (II) Is material upon the issue of factual innocence; and

26 (III) Has never been presented to a court.

27 5. A person who has already obtained postconviction relief
28 that vacated or reversed the person's conviction or sentence may
29 also file a petition pursuant to subsection 1 in the same manner
30 and form as described in this section if no retrial or appeal
31 regarding the offense is pending.

32 6. After a petition is filed pursuant to subsection 1, any
33 prosecuting attorney, law enforcement agency or forensic
34 laboratory that is in possession of any evidence that is the subject
35 of the petition shall preserve such evidence and any information
36 necessary to determine the sufficiency of the chain of custody of
37 such evidence.

38 7. A petition filed pursuant to subsection 1 must include the
39 underlying criminal case number.

40 8. Except as otherwise provided in sections 2 to 9, inclusive,
41 of this act, the Nevada Rules of Civil Procedure govern all
42 proceedings concerning a petition filed pursuant to subsection 1.

43 9. As used in this section:

44 (a) "Biological specimen" has the meaning ascribed to it in
45 NRS 176.09112.



1 (b) "Forensic laboratory" has the meaning ascribed to it in
2 NRS 176.09117.

3 (c) "Genetic marker analysis" has the meaning ascribed to it
4 in NRS 176.09118.

5 **Sec. 7. 1.** *If the court does not dismiss a petition after*
6 *reviewing the petition in accordance with subsection 4 of section 6*
7 *of this act, the court shall order the district attorney to file a*
8 *response to the petition. The district attorney shall, not later than*
9 *120 days after receipt of the court's order requiring a response, or*
10 *within any additional period the court allows, respond to the*
11 *petition and serve a copy upon the petitioner and the Attorney*
12 *General.*

13 **2.** *Not later than 30 days after the date the district attorney*
14 *responds to the petition, the petitioner may reply to the response.*
15 *Not later than 30 days after the expiration of the period during*
16 *which the petitioner may reply to the response, the court shall*
17 *consider the petition, any response by the district attorney and any*
18 *reply by the petitioner. If the court determines that the petition*
19 *meets the requirements of section 6 of this act and that there is a*
20 *bona fide issue of factual innocence regarding the charges of*
21 *which the petitioner was convicted, the court shall order a hearing*
22 *on the petition. If the court does not make such a determination,*
23 *the court shall enter an order denying the petition. For the*
24 *purposes of this subsection, a bona fide issue of factual innocence*
25 *does not exist if the petitioner is merely relitigating facts, issues or*
26 *evidence presented in a previous proceeding or if the petitioner is*
27 *unable to identify with sufficient specificity the nature and*
28 *reliability of the newly discovered evidence that establishes the*
29 *factual innocence of the petitioner. Unless stipulated to by the*
30 *parties, the court may not grant a hearing on the petition during*
31 *any period in which criminal proceedings in the matter are*
32 *pending before any trial or appellate court.*

33 **3.** *If the court grants a hearing on the petition, the hearing*
34 *must be held and the final order must be entered not later than*
35 *150 days after the expiration of the period during which the*
36 *petitioner may reply to the district attorney's response to the*
37 *petition pursuant to subsection 2 unless the court determines that*
38 *additional time is required for good cause shown.*

39 **4.** *If the court grants a hearing on the petition, the court*
40 *shall, upon the request of the petitioner, order the preservation of*
41 *all material and relevant evidence in the possession or control of*
42 *this State or any agent thereof during the pendency of the*
43 *proceeding.*

44 **5.** *If the parties stipulate that the evidence establishes the*
45 *factual innocence of the petitioner, the court may affirm the*



1 *factual innocence of the petitioner without holding a hearing. If*
2 *the prosecuting attorney does not stipulate that the evidence*
3 *establishes the factual innocence of the petitioner, a determination*
4 *of factual innocence must not be made by the court without a*
5 *hearing.*

6 6. *If the parties stipulate that the evidence establishes the*
7 *factual innocence of the petitioner, the prosecuting attorney*
8 *makes a motion to dismiss the original charges against the*
9 *petitioner or, after a hearing, the court determines that the*
10 *petitioner has proven his or her factual innocence by clear and*
11 *convincing evidence, the court shall:*

12 (a) *Vacate the petitioner's conviction and issue an order of*
13 *factual innocence and exoneration; and*

14 (b) *Order the sealing of all documents, papers and exhibits in*
15 *the person's record, minute book entries and entries on dockets*
16 *and other documents relating to the case in the custody of such*
17 *other agencies and officers as are named in the court's order.*

18 7. *Any order granting or denying a hearing on a petition*
19 *pursuant to this section may be appealed by either party.*

20 **Sec. 8.** *If the court grants a hearing on the petition pursuant*
21 *to section 7 of this act, the court may, after determining whether*
22 *the petitioner is indigent pursuant to NRS 171.188 and whether*
23 *counsel was appointed in the case which resulted in the*
24 *conviction, appoint counsel for the petitioner.*

25 **Sec. 9.** *After a petition is filed pursuant to section 6 of this*
26 *act, the district attorney shall make reasonable efforts to provide*
27 *notice to any victim of the crime for which the petitioner was*
28 *convicted that the petition has been filed and that indicates the*
29 *time and place for any hearing that may be held as a result of the*
30 *petition and the disposition thereof.*

31 **Sec. 10.** NRS 176.09187 is hereby amended to read as
32 follows:

33 176.09187 1. If the results of a genetic marker analysis
34 performed pursuant to this section and NRS 176.0918 and
35 176.09183 are favorable to the petitioner ~~†~~

36 ~~—(a) The~~, the petitioner may ~~[bring a motion for a new trial]~~ *file*
37 *a petition to establish the factual innocence of the petitioner* based
38 on ~~[the ground of]~~ newly discovered evidence pursuant to ~~[NRS~~
39 ~~176.515; and~~

40 ~~—(b) The restriction on the time for filing the motion set forth in~~
41 ~~subsection 3 of NRS 176.515 is not applicable.]~~ *section 6 of this*
42 *act.*

43 2. For the purposes of a genetic marker analysis pursuant to
44 this section and NRS 176.0918 and 176.09183, a person who files a



1 petition pursuant to NRS 176.0918 shall be deemed to consent to
2 the:

3 (a) Submission of a biological specimen by the petitioner to
4 determine genetic marker information; and

5 (b) Release and use of genetic marker information concerning
6 the petitioner.

7 3. The petitioner shall pay the cost of a genetic marker analysis
8 performed pursuant to this section and NRS 176.0918 and
9 176.09183, unless the petitioner is incarcerated at the time the
10 petitioner files the petition, found to be indigent pursuant to NRS
11 171.188 and the results of the genetic marker analysis are favorable
12 to the petitioner. If the petitioner is not required to pay the cost of
13 the analysis pursuant to this subsection, the expense of an analysis
14 ordered pursuant to this section and NRS 176.0918 and 176.09183
15 is a charge against the Department of Corrections and must be paid
16 upon approval by the Board of State Prison Commissioners as other
17 claims against the State are paid.

18 4. The remedy provided by this section and NRS 176.0918 and
19 176.09183 is in addition to, is not a substitute for and is not
20 exclusive of any other remedy, right of action or proceeding
21 available to a person convicted of a crime.

22 **Sec. 11.** NRS 176.515 is hereby amended to read as follows:

23 176.515 1. The court may grant a new trial to a defendant if
24 required as a matter of law . ~~for on the ground of newly discovered~~
25 ~~evidence.]~~

26 2. If trial was by the court without a jury, the court may vacate
27 the judgment if entered, take additional testimony and direct the
28 entry of a new judgment.

29 3. ~~Except as otherwise provided in NRS 176.09187, a motion~~
30 ~~for a new trial based on the ground of newly discovered evidence~~
31 ~~may be made only within 2 years after the verdict or finding of guilt.~~
32 ~~—4.]~~ A motion for a new trial ~~[based on any other grounds]~~ must
33 be made within 7 days after the verdict or finding of guilt or within
34 such further time as the court may fix during the 7-day period.

35 **Sec. 12.** NRS 179.275 is hereby amended to read as follows:

36 179.275 Where the court orders the sealing of a record
37 pursuant to NRS 174.034, 176A.265, 176A.295, 179.245, 179.247,
38 179.255, 179.259, 179.2595, 201.354, 453.3365 or 458.330 ~~§~~ **or**
39 **section 7 of this act**, a copy of the order must be sent to:

40 1. The Central Repository for Nevada Records of Criminal
41 History; and

42 2. Each agency of criminal justice and each public or private
43 company, agency, official or other custodian of records named in
44 the order, and that person shall seal the records in his or her custody



1 which relate to the matters contained in the order, shall advise the
2 court of compliance and shall then seal the order.

3 **Sec. 13.** NRS 179.285 is hereby amended to read as follows:

4 179.285 Except as otherwise provided in NRS 179.301:

5 1. If the court orders a record sealed pursuant to NRS 174.034,
6 176A.265, 176A.295, 179.245, 179.247, 179.255, 179.259,
7 179.2595, 201.354, 453.3365 or 458.330 ~~§~~ **or section 7 of this act:**

8 (a) All proceedings recounted in the record are deemed never to
9 have occurred, and the person to whom the order pertains may
10 properly answer accordingly to any inquiry, including, without
11 limitation, an inquiry relating to an application for employment,
12 concerning the arrest, conviction, dismissal or acquittal and the
13 events and proceedings relating to the arrest, conviction, dismissal
14 or acquittal.

15 (b) The person is immediately restored to the following civil
16 rights if the person's civil rights previously have not been restored:

- 17 (1) The right to vote;
18 (2) The right to hold office; and
19 (3) The right to serve on a jury.

20 2. Upon the sealing of the person's records, a person who is
21 restored to his or her civil rights pursuant to subsection 1 must be
22 given:

23 (a) An official document which demonstrates that the person has
24 been restored to the civil rights set forth in paragraph (b) of
25 subsection 1; and

26 (b) A written notice informing the person that he or she has not
27 been restored to the right to bear arms, unless the person has
28 received a pardon and the pardon does not restrict his or her right to
29 bear arms.

30 3. A person who has had his or her records sealed in this State
31 or any other state and whose official documentation of the
32 restoration of civil rights is lost, damaged or destroyed may file a
33 written request with a court of competent jurisdiction to restore his
34 or her civil rights pursuant to this section. Upon verification that the
35 person has had his or her records sealed, the court shall issue an
36 order restoring the person to the civil rights to vote, to hold office
37 and to serve on a jury. A person must not be required to pay a fee to
38 receive such an order.

39 4. A person who has had his or her records sealed in this State
40 or any other state may present official documentation that the person
41 has been restored to his or her civil rights or a court order restoring
42 civil rights as proof that the person has been restored to the right to
43 vote, to hold office and to serve as a juror.



1 **Sec. 14.** NRS 179.295 is hereby amended to read as follows:

2 179.295 1. The person who is the subject of the records that
3 are sealed pursuant to NRS 174.034, 176A.265, 176A.295, 179.245,
4 179.247, 179.255, 179.259, 179.2595, 201.354, 453.3365 or
5 458.330 *or section 7 of this act* may petition the court that ordered
6 the records sealed to permit inspection of the records by a person
7 named in the petition, and the court may order such inspection.
8 Except as otherwise provided in this section, subsection 9 of NRS
9 179.255 and NRS 179.259 and 179.301, the court may not order the
10 inspection of the records under any other circumstances.

11 2. If a person has been arrested, the charges have been
12 dismissed and the records of the arrest have been sealed, the court
13 may order the inspection of the records by a prosecuting attorney
14 upon a showing that as a result of newly discovered evidence, the
15 person has been arrested for the same or a similar offense and that
16 there is sufficient evidence reasonably to conclude that the person
17 will stand trial for the offense.

18 3. The court may, upon the application of a prosecuting
19 attorney or an attorney representing a defendant in a criminal action,
20 order an inspection of such records for the purpose of obtaining
21 information relating to persons who were involved in the incident
22 recorded.

23 4. This section does not prohibit a court from considering a
24 conviction for which records have been sealed pursuant to NRS
25 174.034, 176A.265, 176A.295, 179.245, 179.247, 179.255, 179.259,
26 179.2595, 201.354, 453.3365 or 458.330 in determining whether to
27 grant a petition pursuant to NRS 176A.265, 176A.295, 179.245,
28 179.255, 179.259, 179.2595, 453.3365 or 458.330 for a conviction
29 of another offense.

30 **Sec. 15.** This act becomes effective on July 1, 2019.

