Assembly Bill No. 356–Assemblyman McCurdy

CHAPTER.....

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) **Sections 2-9** of this bill establish provisions relating to a petition for a hearing to establish the factual innocence of a person based on newly discovered evidence, which may be filed at any time after the expiration of the period during which a motion for a new trial based on the ground of newly discovered evidence may be made.

**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 and to dismiss such a petition in certain circumstances. **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 or the Attorney General to file a response to the petition; and (2) authorizes the petitioner to reply to the response of the district attorney or the Attorney General. **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 section 9** of this bill requires the district attorney to make reasonable efforts to provide notice to any victim of the crime for which the petitioner was convicted that a petition has been filed if such a victim has indicated a desire to be notified regarding any postconviction proceedings.

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

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

**Section 1.** Chapter 34 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this act.

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

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

**Sec. 4.** ***"Factual innocence" means that a person did not:***

***1. Engage in the conduct for which he or she was convicted;***

***2. Engage in conduct constituting a lesser included or inchoate offense of the crime for which he or she was convicted;***

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

***4. Commit the conduct charged by the State under any theory of criminal liability alleged in the indictment or information.***

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

***1. Evidence that was discovered before or during the applicable period for any direct appeal or postconviction petition for a writ of habeas corpus pursuant to this chapter that served in whole or in part as the basis to vacate or reverse the petitioner's conviction;***

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

***3. Relevant forensic scientific evidence, other than the expert opinion of a psychologist, psychiatrist or other mental health professional, that was not available at the time of trial or during the resolution by the trial court of any motion to withdraw a guilty plea or motion for new trial, or that undermines materially forensic scientific evidence presented at trial. Forensic scientific evidence is considered to be undermined if new research or information exists that repudiates the foundational validity of***

***scientific evidence or testimony or the applied validity of a scientific method or technique. As used in this subsection:***

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

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

**Sec. 5.5.** ***For the purposes of sections 2 to 9, inclusive, of this act, evidence is "material" if the evidence establishes a reasonable probability of a different outcome.***

**Sec. 5.7.** ***Any claim of factual innocence that is made pursuant to sections 2 to 9, inclusive, of this act is separate from any state habeas claim that alleges a fundamental miscarriage of justice to excuse procedural or time limitations pursuant to NRS 34.726 or 34.810.***

**Sec. 6.** ***1. At any time after the expiration of the period during which a motion for a new trial based on newly discovered evidence may be made pursuant to NRS 176.515, a person who has been convicted of a felony may petition the district court in the county in which the person was convicted for a hearing to establish the factual innocence of the person based on newly discovered evidence. A person who files a petition pursuant to this subsection shall serve notice and a copy of the petition upon the district attorney of the county in which the conviction was obtained and the Attorney General.***

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

***(a) Newly discovered evidence exists that is specifically identified and, if credible, establishes a bona fide issue of factual innocence;***

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

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

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

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

***(c) If some or all of the newly discovered evidence alleged in the petition is a biological specimen, that a genetic marker***

***analysis was performed pursuant to NRS 176.0918, 176.09183 and 176.09187 and the results were favorable to the petitioner; and***

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

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

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

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

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

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

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

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

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

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

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

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

***5. Any second or subsequent petition filed by a person must be dismissed if the court determines that the petition fails to identify new or different evidence in support of the factual***

***innocence claim or, if new and different grounds are alleged, the court finds that the failure of the petitioner to assert those grounds in a prior petition filed pursuant to this section constituted an abuse of the writ.***

***6. The court shall provide a written explanation of its order to dismiss or not to dismiss the petition based on the requirements set forth in subsections 2 and 3.***

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

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

***9. A petition filed pursuant to subsection 1 must include the underlying criminal case number.***

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

***11. As used in this section:***

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

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

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

**Sec. 7.** ***1. If the court does not dismiss a petition after reviewing the petition in accordance with section 6 of this act, the court shall order the district attorney or the Attorney General to file a response to the petition. The court's order must:***

***(a) Specify which claims identified in the petition warrant a response from the district attorney or the Attorney General; and***

***(b) Specify which newly discovered evidence identified in the petition, if credible, might establish a bona fide issue of factual innocence.***

***2. The district attorney or the Attorney General shall, not later than 120 days after receipt of the court's order requiring a response, or within any additional period the court allows, respond to the petition and serve a copy upon the petitioner and, if the***

***district attorney is responding to the petition, the Attorney General.***

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

***4. If the court grants a hearing on the petition, the hearing must be held and the final order must be entered not later than 150 days after the expiration of the period during which the petitioner may reply to the response to the petition by the district attorney or the Attorney General pursuant to subsection 3 unless the court determines that additional time is required for good cause shown.***

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

***6. If the parties stipulate that the evidence establishes the factual innocence of the petitioner, the court may affirm the factual innocence of the petitioner without holding a hearing. If the prosecuting attorney does not stipulate that the evidence establishes the factual innocence of the petitioner, a determination of factual innocence must not be made by the court without a hearing.***

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

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

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

***8. The court shall provide a written explanation of its determination that the petitioner proved or failed to prove his or her factual innocence by clear and convincing evidence.***

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

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

**Sec. 9.** ***After a petition is filed pursuant to section 6 of this act, if any victim of the crime for which the petitioner was convicted has indicated a desire to be notified regarding any postconviction proceedings, the district attorney shall make reasonable efforts to provide notice to such a victim that the petition has been filed and that indicates the time and place for any hearing that may be held as a result of the petition and the disposition thereof.***

**Secs. 10 and 11.** (Deleted by amendment.)

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

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

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

2. Each agency of criminal justice and each public or private company, agency, official or other custodian of records named in the order, and that person shall seal the records in his or her custody which relate to the matters contained in the order, shall advise the court of compliance and shall then seal the order.

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

179.285 Except as otherwise provided in NRS 179.301:

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

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

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

(1) The right to vote;

(2) The right to hold office; and

(3) The right to serve on a jury.

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

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

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

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

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

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

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

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

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

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

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