

ASSEMBLY BILL NO. 344—ASSEMBLYMAN AIZLEY

MARCH 21, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing preservation of biological evidence and genetic marker testing. (BDR 14-270)

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

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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; revising the offenses for which a defendant convicted of a crime must provide a biological specimen; authorizing persons convicted of those offenses to petition the court for postconviction genetic marker analysis; requiring the destruction of a biological specimen under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Section 2 of this bill revises the list of offenses for which a defendant convicted of a crime must provide a biological specimen.

Existing law allows a person convicted of a category A or B felony and under a sentence of imprisonment to petition the court for postconviction genetic marker analysis after meeting certain other requirements. (NRS 176.0918) **Section 3** of this bill allows a person convicted of any of the new offenses listed in **section 2** to petition the court for such postconviction genetic marker analysis. In addition, **section 3** provides that if a petitioner is not convicted as a result of a new trial stemming from the postconviction genetic marker analysis, the law enforcement agency, forensic laboratory and Central Repository for Nevada Records of Criminal History shall, upon notification of the fact that the petitioner was not convicted, destroy the biological specimen obtained from the petitioner and all records thereof, unless the petitioner was convicted of a prior offense for which the biological specimen must be maintained.



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

Section 1. NRS 176.0912 is hereby amended to read as follows:

176.0912 1. Except as otherwise provided in this section, upon the conviction of a defendant for ~~[a category A or B felony.]~~ *an offense listed in subsection 4 of NRS 176.0913*, an agency of criminal justice that has in its possession or custody any biological evidence secured in connection with the investigation or prosecution of the defendant shall preserve such evidence until the expiration of any sentence imposed on the defendant.

2. Biological evidence subject to the requirements of this section may be consumed for testing upon notice to the defendant.

3. An agency of criminal justice may establish procedures for:

(a) Retaining probative samples of biological evidence subject to the requirements of this section; and

(b) Disposing of bulk evidence that does not affect the suitability of such probative samples for testing.

4. The provisions of this section must not be construed to restrict or limit an agency of criminal justice from establishing procedures for the retention, preservation and disposal of biological evidence secured in connection with other criminal cases.

5. As used in this section:

(a) "Agency of criminal justice" has the meaning ascribed to it in NRS 179A.030.

(b) "Biological evidence" means any semen, blood, saliva, hair, skin tissue or other identified biological material removed from physical evidence.

~~[(c) "Sexual offense" has the meaning ascribed to it in NRS 179D.097.]~~

Sec. 2. NRS 176.0913 is hereby amended to read as follows:

176.0913 1. If a defendant is convicted of an offense listed in subsection 4:

(a) The name, social security number, date of birth and any other information identifying the defendant must be submitted to the Central Repository for Nevada Records of Criminal History; and

(b) A biological specimen must be obtained from the defendant pursuant to the provisions of this section and the specimen must be used for an analysis to determine the genetic markers of the specimen.

2. If the defendant is committed to the custody of the Department of Corrections, the Department of Corrections shall arrange for the biological specimen to be obtained from the defendant. The Department of Corrections shall provide the



specimen to the forensic laboratory that has been designated by the county in which the defendant was convicted to conduct or oversee genetic marker testing for the county pursuant to NRS 176.0917.

3. If the defendant is not committed to the custody of the Department of Corrections, the Division shall arrange for the biological specimen to be obtained from the defendant. The Division shall provide the specimen to the forensic laboratory that has been designated by the county in which the defendant was convicted to conduct or oversee genetic marker testing for the county pursuant to NRS 176.0917. Any cost that is incurred to obtain a biological specimen from a defendant pursuant to this subsection is a charge against the county in which the defendant was convicted and must be paid as provided in NRS 176.0915.

4. Except as otherwise provided in subsection 5, the provisions of subsection 1 apply to a defendant who is convicted of:

- (a) ~~[A felony;~~
- ~~—(b) A crime against a child as defined in NRS 179D.0357;~~
- ~~—(c) A sexual offense as defined in NRS 179D.097;~~
- ~~—(d) Abuse or neglect of an older person or a vulnerable person pursuant to NRS 200.5099;~~
- ~~—(e) A second or subsequent offense for stalking pursuant to NRS 200.575;~~
- ~~—(f) An attempt or conspiracy to commit an offense listed in paragraphs (a) to (e), inclusive;~~
- ~~—(g) Failing to register with a local law enforcement agency as a convicted person as required pursuant to NRS 179C.100, if the defendant previously was:~~
 - ~~—(1) Convicted in this State of committing an offense listed in paragraph (a), (d), (e) or (f); or~~
 - ~~—(2) Convicted in another jurisdiction of committing an offense that would constitute an offense listed in paragraph (a), (d), (e) or (f) if committed in this State;~~
- ~~—(h) Failing to register with a local law enforcement agency after being convicted of a crime against a child as required pursuant to NRS 179D.450; or~~
- ~~—(i) Failing to register with a local law enforcement agency after being convicted of a sexual offense as required pursuant to NRS 179D.450.]~~ **Murder;**
- (b) **Voluntary manslaughter;**
- (c) **Battery which is punished as a felony;**
- (d) **Assault which is punished as a felony;**
- (e) **Kidnapping;**
- (f) **Sexual assault;**
- (g) **Battery with intent to commit sexual assault;**
- (h) **Lewdness with a child;**



1 *(i) An offense involving pornography and a minor pursuant to*
2 *NRS 200.710 to 200.730, inclusive;*

3 *(j) Arson;*

4 *(k) Robbery;*

5 *(l) Burglary;*

6 *(m) Grand larceny; or*

7 *(n) A violation of NRS 484C.110, 484C.120, 484C.130 or*
8 *484C.430 that is punishable as a felony.*

9 5. If it is determined that a defendant's biological specimen has
10 previously been submitted for conviction of a prior offense, an
11 additional sample is not required.

12 6. Except as otherwise authorized by federal law or by specific
13 statute, a biological specimen obtained pursuant to this section, the
14 results of a genetic marker analysis and any information identifying
15 or matching a biological specimen with a person must not be shared
16 with or disclosed to any person other than the authorized personnel
17 who have possession and control of the biological specimen, results
18 of a genetic marker analysis or information identifying or matching
19 a biological specimen with a person, except pursuant to:

20 (a) A court order; or

21 (b) A request from a law enforcement agency during the course
22 of an investigation.

23 7. A person who violates any provision of subsection 6 is
24 guilty of a misdemeanor.

25 **Sec. 3.** NRS 176.0918 is hereby amended to read as follows:

26 176.0918 1. A person convicted of ~~fa category A or B felony~~
27 *an offense listed in subsection 4 of NRS 176.0913* who is under
28 sentence of imprisonment for that conviction and who otherwise
29 meets the requirements of this section may file a postconviction
30 petition requesting a genetic marker analysis of evidence within the
31 possession or custody of the State which may contain genetic
32 marker information relating to the investigation or prosecution that
33 resulted in the judgment of conviction. If the case involves a
34 sentence of death, the petition must include, without limitation, the
35 date scheduled for the execution, if it has been scheduled.

36 2. Such a petition must be filed with the clerk of the district
37 court for the county in which the petitioner was convicted on a form
38 prescribed by the Department of Corrections. A copy of the petition
39 must be served by registered mail upon:

40 (a) The Attorney General; and

41 (b) The district attorney in the county in which the petitioner
42 was convicted.

43 3. A petition filed pursuant to this section must be
44 accompanied by a declaration under penalty of perjury attesting that
45 the information contained in the petition does not contain any



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1 material misrepresentation of fact and that the petitioner has a good
2 faith basis relying on particular facts for the request. The petition
3 must include, without limitation:

4 (a) Information identifying specific evidence either known or
5 believed to be in the possession or custody of the State that can be
6 subject to genetic marker analysis;

7 (b) The rationale for why a reasonable possibility exists that the
8 petitioner would not have been prosecuted or convicted if
9 exculpatory results had been obtained through a genetic marker
10 analysis of the evidence identified in paragraph (a);

11 (c) An identification of the type of genetic marker analysis the
12 petitioner is requesting to be conducted on the evidence identified in
13 paragraph (a);

14 (d) If applicable, the results of all prior genetic marker analysis
15 performed on evidence in the trial which resulted in the petitioner's
16 conviction; and

17 (e) A statement that the type of genetic marker analysis the
18 petitioner is requesting was not available at the time of trial or, if it
19 was available, that the failure to request genetic marker analysis
20 before the petitioner was convicted was not a result of a strategic or
21 tactical decision as part of the representation of the petitioner at the
22 trial.

23 4. If a petition is filed pursuant to this section, the court may:

24 (a) Dismiss the petition without a hearing if the court
25 determines, based on the information contained in the petition, that
26 the petitioner does not meet the requirements set forth in this
27 section;

28 (b) After determining whether the petitioner is indigent pursuant
29 to NRS 171.188 and whether counsel was appointed in the case
30 which resulted in the conviction, appoint counsel for the limited
31 purpose of reviewing, supplementing and presenting the petition to
32 the court; or

33 (c) Schedule a hearing on the petition. If the court schedules a
34 hearing on the petition, the court shall determine which person or
35 agency has possession or custody of the evidence and shall
36 immediately issue an order requiring, during the pendency of the
37 proceeding, each person or agency in possession or custody of the
38 evidence to:

39 (1) Preserve all evidence within the possession or custody of
40 the person or agency that may be subjected to genetic marker
41 analysis pursuant to this section;

42 (2) Within 90 days, prepare an inventory of all evidence
43 relevant to the claims in the petition within the possession or
44 custody of the person or agency that may be subjected to genetic
45 marker analysis pursuant to this section; and



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(3) Within 90 days, submit a copy of the inventory to the petitioner, the prosecuting attorney and the court.

5. Within 90 days after the inventory of all evidence is prepared pursuant to subsection 4, the prosecuting attorney may file a written response to the petition with the court.

6. If the court holds a hearing on a petition filed pursuant to this section, the hearing must be presided over by the judge who conducted the trial that resulted in the conviction of the petitioner, unless that judge is unavailable. Any evidence presented at the hearing by affidavit must be served on the opposing party at least 15 days before the hearing.

7. The court shall order a genetic marker analysis, after considering the information contained in the petition pursuant to subsection 3 and any other evidence, if the court finds that:

(a) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;

(b) The evidence to be analyzed exists; and

(c) Except as otherwise provided in subsection 8, the evidence was not previously subjected to a genetic marker analysis.

8. If the evidence was previously subjected to a genetic marker analysis, the court shall order a genetic marker analysis pursuant to subsection 7 if the court finds that:

(a) The result of the previous analysis was inconclusive;

(b) The evidence was not subjected to the type of analysis that is now requested and the requested analysis may resolve an issue not resolved by the previous analysis; or

(c) The requested analysis would provide results that are significantly more accurate and probative of the identity of the perpetrator than the previous analysis.

9. If the court orders a genetic marker analysis pursuant to subsection 7 or 8, the court shall:

(a) Order the analysis to be conducted promptly under reasonable conditions designed to protect the interest of the State and the petitioner in the integrity of the evidence and the analysis process.

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:

(1) Be operated by this state or one of its political subdivisions, when possible; and

(2) Satisfy the standards for quality assurance that are established for forensic laboratories by the Federal Bureau of Investigation.



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(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:

(1) Be specified in the order; and

(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

(d) Order the production of any reports that are prepared by a forensic laboratory in connection with the analysis and any data and notes upon which the report is based.

(e) Order the preservation of evidence used in a genetic marker analysis performed pursuant to this section for purposes of a subsequent proceeding or analysis, if any.

(f) Order the results of the genetic marker analysis performed pursuant to this section to be sent to the State Board of Parole Commissioners if the results of the genetic marker analysis are not favorable to the petitioner.

10. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner:

(a) The petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515; and

(b) The restriction on the time for filing the motion set forth in subsection 3 of NRS 176.515 is not applicable.

11. *If the petitioner is not convicted as a result of a new trial:*

(a) The clerk of the court shall notify the appropriate law enforcement agency, the appropriate forensic laboratory and the Central Repository for Nevada Records of Criminal History of the final disposition of the criminal proceedings; and

(b) The law enforcement agency, forensic laboratory and Central Repository for Nevada Records of Criminal History shall, upon notification of the fact that the petitioner was not convicted at trial, destroy the biological specimen obtained from the petitioner pursuant to NRS 176.0913 and all records thereof, unless the petitioner was convicted of a prior offense for which the biological specimen must be maintained.

12. The court shall dismiss a petition filed pursuant to this section if:

(a) The requirements for ordering a genetic marker analysis pursuant to this section are not satisfied; or

(b) The results of a genetic marker analysis performed pursuant to this section are not favorable to the petitioner.



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~~12.~~ 13. For the purposes of a genetic marker analysis pursuant to this section, a person who files a petition pursuant to this section shall be deemed to consent to the:

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

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

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

~~14.~~ 15. The remedy provided by this section is in addition to, is not a substitute for and is not exclusive of any other remedy, right of action or proceeding available to a person convicted of a crime.

~~15.~~ 16. If a petitioner files a petition pursuant to this section, the court schedules a hearing on the petition and a victim of the crime for which the petitioner was convicted has requested notice pursuant to NRS 178.5698, the district attorney in the county in which the petitioner was convicted shall provide to the victim notice of:

(a) The fact that the petitioner filed a petition pursuant to this section;

(b) The time and place of the hearing scheduled by the court as a result of the petition; and

(c) The outcome of any hearing on the petition.

Sec. 4. The amendatory provisions of:

1. Section 2 of this act apply to a person who was convicted of an offense listed in subsection 4 of NRS 176.0913 on or after October 1, 2011.

2. Section 3 of this act apply to a person who was convicted of an offense listed in subsection 4 of NRS 176.0913 before, on or after October 1, 2011.

