

ASSEMBLY BILL NO. 268—ASSEMBLYMEN WATKINS, FUMO,
OHRENSCHALL, JAUREGUI, BILBRAY-AXELROD; BROOKS,
EDWARDS, FRIERSON, KRAMER, MONROE-MORENO, NEAL,
TOLLES AND YEAGER

MARCH 8, 2017

JOINT SPONSOR: SENATOR HARDY

Referred to Committee on Judiciary

SUMMARY—Authorizes certain persons to file a postconviction
petition to pay the cost of a genetic marker analysis.
(BDR 14-638)

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; authorizing certain persons
to file a postconviction petition to pay the cost of a
genetic marker analysis; requiring a court to order a
genetic marker analysis upon the filing of such a petition;
authorizing the State to charge a reasonable fee for the
cataloging of evidence subject to such a genetic marker
analysis and the transferring of such evidence to a
forensic laboratory in certain circumstances; requiring a
petitioner to pay the cost of such a genetic marker
analysis before the analysis is performed; providing that
the provisions of this act are not severable; and providing
other matters properly relating thereto.

Legislative Counsel's Digest:

- 1 Existing law authorizes a person convicted of a felony to file a postconviction
- 2 petition requesting a genetic marker analysis of evidence within the possession or
- 3 custody of the State which may contain genetic marker information relating to the
- 4 investigation or prosecution that resulted in the judgment of conviction. After such
- 5 a petition is filed, the court may schedule a hearing on the petition. (NRS 176.0918)
- 6 Existing law requires the court to order a genetic marker analysis if, after
- 7 considering the information contained in the petition and any other evidence, the



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8 court makes certain findings. (NRS 176.09183) Existing law further requires the
9 petitioner to pay for the cost of the genetic marker analysis unless: (1) the petitioner
10 is incarcerated at the time he or she files the petition and is found to be indigent;
11 and (2) the results of the genetic marker analysis are favorable to the petitioner. If
12 the petitioner is not required to pay the cost of the genetic marker analysis, the
13 expense is a charge against the Department of Corrections. (NRS 176.09187)

14 **Section 1** of this bill authorizes a person convicted of a felony to file a
15 postconviction petition requesting to pay the cost of a genetic marker analysis.
16 **Section 1** provides that such a petition is generally subject to the same requirements
17 imposed for a postconviction petition for a genetic marker analysis filed pursuant to
18 existing law, but there is no requirement for a hearing on such a petition. **Section 1**
19 also requires a petitioner to: (1) indicate in such a petition whether he or she prefers
20 to have a specific forensic laboratory conduct the genetic marker analysis; and (2)
21 select from certain forensic laboratories in certain circumstances. **Section 3** of this
22 bill requires a court to order a genetic marker analysis if such a petition is filed.
23 **Section 3** also provides that if the court selects a forensic laboratory that is not
24 operated by this State or one of its political subdivisions to conduct or oversee such
25 a genetic marker analysis, the State is authorized to charge the petitioner a
26 reasonable fee for the cataloging of the evidence subject to the genetic marker
27 analysis and the transferring of such evidence to the forensic laboratory. **Section 4**
28 of this bill provides that a petitioner who files a petition requesting to pay the cost
29 of a genetic marker analysis is required to pay the cost before the analysis is
30 performed and is not eligible for an exemption from payment. **Sections 2 and 5** of
31 this bill make conforming changes.

32 **Section 5.5** of this bill provides that the provisions of this bill are not severable
33 and, if any portion of this bill is held to be unconstitutional or invalid for any reason
34 by a court of competent jurisdiction, the remaining provisions of this bill shall be
35 deemed to be invalid.

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 a new section to read as follows:

3 *1. A person convicted of a felony may file a postconviction*
4 *petition requesting to pay the cost of a genetic marker analysis of*
5 *evidence within the possession or custody of the State which may*
6 *contain genetic marker information relating to the investigation or*
7 *prosecution that resulted in the judgment of conviction. If the case*
8 *involves a sentence of death, the petition must include, without*
9 *limitation, the date scheduled for the execution, if it has been*
10 *scheduled.*

11 *2. Such a petition must be filed with the clerk of the district*
12 *court for the county in which the petitioner was convicted on a*
13 *form prescribed by the Department of Corrections. A copy of the*
14 *petition must be served by registered mail upon:*

15 *(a) The Attorney General; and*

16 *(b) The district attorney in the county in which the petitioner*
17 *was convicted.*



1 3. A petition filed pursuant to this section must be
2 accompanied by a declaration under penalty of perjury attesting
3 that the information contained in the petition does not contain any
4 material misrepresentation of fact and that the petitioner has a
5 good faith basis relying on particular facts for the request. The
6 petition must include, without limitation:

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

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

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

16 (d) An indication as to whether, subject to the provisions of
17 subsection 5, the petitioner prefers to have a specific forensic
18 laboratory conduct the genetic marker analysis.

19 4. If a petition is filed pursuant to this section, the court shall
20 determine which person or agency has possession or custody of
21 the evidence and shall immediately issue an order requiring each
22 person or agency in possession or custody of the evidence to:

23 (a) Preserve all evidence within the possession or custody of
24 the person or agency that may be subjected to genetic marker
25 analysis pursuant to this section;

26 (b) Within 90 days, prepare an inventory of all evidence
27 relevant to the claims in the petition within the possession or
28 custody of the person or agency that may be subjected to genetic
29 marker analysis pursuant to this section; and

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

32 5. If a petitioner does not wish to have a forensic laboratory
33 that is operated by this State or one of its political subdivisions
34 conduct the genetic marker analysis requested pursuant to this
35 section and this State or one of its political subdivisions has a
36 contract with two or more private forensic laboratories that are
37 capable of conducting a genetic marker analysis, the petitioner
38 shall, when indicating any preference for a forensic laboratory to
39 conduct the genetic marker analysis pursuant to paragraph (d) of
40 subsection 3, select such a private forensic laboratory with which
41 the State or one of its political subdivisions has a contract.

42 6. If a petitioner files a petition pursuant to this section and a
43 victim of the crime for which the petitioner was convicted has
44 requested notice pursuant to NRS 178.5698, the district attorney in
45 the county in which the petitioner was convicted shall provide to



1 *the victim notice of the fact that the petitioner filed a petition*
2 *pursuant to this section.*

3 **Sec. 2.** NRS 176.0911 is hereby amended to read as follows:

4 176.0911 As used in NRS 176.0911 to 176.0919, inclusive,
5 *and section 1 of this act*, unless the context otherwise requires, the
6 words and terms defined in NRS 176.09111 to 176.09119, inclusive,
7 have the meanings ascribed to them in those sections.

8 **Sec. 3.** NRS 176.09183 is hereby amended to read as follows:

9 176.09183 1. The court shall order a genetic marker analysis

10 ~~if~~:

11 *(a) The petition for the analysis was filed pursuant to NRS*
12 *176.0918 and*, after considering the information contained in the
13 petition ~~pursuant to subsection 3 of NRS 176.0918~~ and any other
14 evidence, ~~if~~ the court finds that:

15 ~~(a)~~ (1) A reasonable possibility exists that the petitioner would
16 not have been prosecuted or convicted if exculpatory results had
17 been obtained through a genetic marker analysis of the evidence
18 identified in the petition;

19 ~~(b)~~ (2) The evidence to be analyzed exists; and

20 ~~(c)~~ (3) Except as otherwise provided in subsection 2, the
21 evidence was not previously subjected to a genetic marker analysis
22 ~~if~~; or

23 *(b) The petition for the analysis was filed pursuant to section 1*
24 *of this act.*

25 2. If the evidence was previously subjected to a genetic marker
26 analysis, the court shall order a genetic marker analysis pursuant to
27 *paragraph (a) of* subsection 1 if the court finds that:

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

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

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

35 3. If the court orders a genetic marker analysis pursuant to
36 subsection 1 or 2, the court shall:

37 ~~(a) Order~~ *Subject to the provisions of subsection 4, order* the
38 analysis to be conducted promptly under reasonable conditions
39 designed to protect the interest of the State and the petitioner in the
40 integrity of the evidence and the analysis process.

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

43 (1) ~~Be~~ *If the analysis is ordered pursuant to paragraph (a)*
44 *of subsection 1, be* operated by this state or one of its political
45 subdivisions, when possible; ~~and~~



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(2) *If the analysis is ordered pursuant to paragraph (b) of subsection 1, be the forensic laboratory indicated by the petitioner pursuant to paragraph (d) of subsection 3 of section 1 of this act, when possible, if the petitioner complied with the provisions of subsection 5 of section 1 of this act; and*

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

(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 ~~the~~ *the* genetic marker analysis ~~performed pursuant to this section and NRS 176.0918 and 176.09187~~ for purposes of a subsequent proceeding or analysis, if any.

(f) Order the results of the genetic marker analysis ~~performed pursuant to this section and NRS 176.0918 and 176.09187~~ to be sent to the State Board of Parole Commissioners if the results of the genetic marker analysis are not favorable to the petitioner.

4. *Notwithstanding the provisions of paragraph (a) of subsection 3, if the petition for a genetic marker analysis was filed pursuant to section 1 of this act, the forensic laboratory ordered to perform the analysis pursuant to paragraph (c) of subsection 3 shall not perform the analysis until the petitioner pays the cost of the analysis, as required by subsection 3 of NRS 176.09187.*

5. *If the court selects a forensic laboratory that is not operated by this State or one of its political subdivisions to conduct or oversee a genetic marker analysis pursuant to subparagraph (2) of paragraph (b) of subsection 3, the State may charge the petitioner a reasonable fee for the cataloging of the evidence subject to the genetic marker analysis and the transferring of such evidence to the forensic laboratory.*

6. If the court orders a genetic marker analysis pursuant to subsection 1 or 2, the State may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution



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1 within 30 days after the notice of the entry of the order by filing a
2 notice of appeal with the clerk of the district court.

3 ~~§ 7.~~ 7. The court shall enter an order dismissing a petition filed
4 pursuant to NRS 176.0918 *or section 1 of this act* if:

5 (a) The requirements for ordering a genetic marker analysis
6 pursuant to this section and NRS 176.0918 and 176.09187 are not
7 satisfied; or

8 (b) The results of a genetic marker analysis performed ~~pursuant~~
9 ~~to this section and NRS 176.0918 and 176.09187~~ *as the result of*
10 *the petition* are not favorable to the petitioner.

11 ~~§ 8.~~ 8. If the court enters an order dismissing a petition filed
12 pursuant to NRS 176.0918 ~~§~~ *or section 1 of this act*, the person
13 aggrieved by the order may appeal to the appellate court of
14 competent jurisdiction pursuant to the rules fixed by the Supreme
15 Court pursuant to Section 4 of Article 6 of the Nevada Constitution
16 within 30 days after the notice of the entry of the order by filing a
17 notice of appeal with the clerk of the district court.

18 **Sec. 4.** NRS 176.09187 is hereby amended to read as follows:

19 176.09187 1. If the results of a genetic marker analysis
20 performed *as the result of a petition filed* pursuant to ~~this section~~
21 ~~and~~ NRS 176.0918 ~~and 176.09183~~ *or section 1 of this act* are
22 favorable to the petitioner:

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

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

28 2. For the purposes of a genetic marker analysis, ~~pursuant to~~
29 ~~this section and NRS 176.0918 and 176.09183,~~ a person who files a
30 petition pursuant to NRS 176.0918 *or section 1 of this act* shall be
31 deemed to consent to the:

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

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

36 3. ~~The~~ *Except as otherwise provided in subsection 4, the*
37 petitioner shall pay the cost of a genetic marker analysis performed
38 *as the result of a petition filed* pursuant to ~~this section and~~ NRS
39 176.0918 ~~and 176.09183, unless~~ *or section 1 of this act. If the*
40 *petition was filed pursuant to section 1 of this act, the petitioner*
41 *must pay the cost of the analysis before the analysis is performed.*

42 4. *The petitioner is not responsible for paying the cost of a*
43 *genetic marker analysis performed as the result of a petition filed*
44 *pursuant to NRS 176.0918 if* the petitioner is incarcerated at the
45 time the petitioner files the petition, *is* found to be indigent pursuant



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1 to NRS 171.188 and the results of the genetic marker analysis are
2 favorable to the petitioner.

3 5. If the petitioner is not required to pay the cost of the analysis
4 pursuant to ~~[this]~~ subsection ~~[,]~~ 4, the expense of an analysis
5 ~~[ordered]~~ *performed as the result of a petition filed* pursuant to
6 ~~[this section and]~~ NRS 176.0918 ~~[and 176.09183]~~ is a charge
7 against the Department of Corrections and must be paid upon
8 approval by the Board of State Prison Commissioners as other
9 claims against the State are paid.

10 ~~[4]~~ 6. The remedy provided by this section and NRS 176.0918
11 and 176.09183 *and section 1 of this act* is in addition to, is not a
12 substitute for and is not exclusive of any other remedy, right of
13 action or proceeding available to a person convicted of a crime.

14 **Sec. 5.** NRS 176.0919 is hereby amended to read as follows:

15 176.0919 1. After a judge grants a petition requesting a
16 genetic marker analysis pursuant to NRS 176.0918 ~~[, 176.09183 and~~
17 ~~176.09187,]~~ *or section 1 of this act*, if the case involves a sentence
18 of death and a judge determines that the genetic marker analysis
19 cannot be completed before the date of the execution of the
20 petitioner, the judge shall stay the execution of the judgment of
21 death pending the results of the analysis.

22 2. If the case involves a sentence of death and the results of an
23 analysis ordered and conducted *as the result of a petition filed*
24 pursuant to NRS 176.0918 ~~[, 176.09183 and 176.09187]~~ *or section*
25 *1 of this act* are not favorable to the petitioner:

26 (a) Except as otherwise provided in paragraph (b), the Director
27 of the Department of Corrections shall, in due course, execute the
28 judgment of death.

29 (b) If the judgment of death has been stayed pursuant to
30 subsection 1, the judge shall cause a certified copy of the order
31 staying the execution of the judgment and a certified copy of the
32 report of genetic marker analysis that indicates results which are not
33 favorable to the petitioner to be immediately forwarded by the clerk
34 of the court to the district attorney. Upon receipt, the district
35 attorney shall pursue the issuance of a new warrant of execution of
36 the judgment of death in the manner provided in NRS 176.495.

37 **Sec. 5.5.** Notwithstanding the provisions of NRS 0.020, the
38 provisions of this act are not severable. If any portion of this act is
39 held to be unconstitutional or invalid for any reason by the decision
40 of any court of competent jurisdiction, the remaining provisions of
41 this act shall be deemed to be invalid.

42 **Sec. 6.** This act becomes effective on July 1, 2018.

