

Amendment No. 307

Assembly Amendment to Assembly Bill No. 356	(BDR 14-863)
Proposed by: Assembly Committee on Judiciary	
Amends: Summary: Yes Title: No Preamble: No Joint Sponsorship: No Digest: Yes	

ASSEMBLY ACTION				Initial and Date	SENATE ACTION				Initial and Date
Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) variations of green bold underlining is language proposed to be added in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill proposed to be retained in this amendment.



ASSEMBLY BILL NO. 356—ASSEMBLYMAN MCCURDY

MARCH 19, 2019

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing criminal procedure. (BDR ~~14-863~~)
3-863)

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]~~ 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 ~~[.]~~, 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. **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 **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.

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

Section 1. ~~[Chapter 176]~~ Title 3 of NRS is hereby amended by adding thereto a new chapter to consist of 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; ~~and~~*

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~~; 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 ~~relevant~~ material to the determination of the issue of factual innocence, including, without limitation:*

1. *Evidence that was discovered before or during the ~~course of~~ applicable period for any direct appeal or postconviction ~~proceeding~~ petition for a writ of habeas corpus pursuant to chapter 34 of NRS 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. 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~~

1 *discovered evidence. A person who files a petition pursuant to this subsection*
2 *shall serve notice and a copy of the petition upon the district attorney of the*
3 *county in which the conviction was obtained and the Attorney General.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

52 *5. A person who has already obtained postconviction relief that vacated or*
53 *reversed the person's conviction or sentence may also file a petition pursuant to*

1 *subsection 1 in the same manner and form as described in this section if no*
2 *retrial or appeal regarding the offense is pending.*

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

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

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

13 9. *As used in this section:*

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

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

16 (c) *“Genetic marker analysis” has the meaning ascribed to it in NRS*
17 *176.09118.*

18 **Sec. 7. 1.** *If the court does not dismiss a petition after reviewing the*
19 *petition in accordance with subsection 4 of section 6 of this act, the court shall*
20 *order the district attorney to file a response to the petition. The district attorney*
21 *shall, not later than 120 days after receipt of the court’s order requiring a*
22 *response, or within any additional period the court allows, respond to the petition*
23 *and serve a copy upon the petitioner and the Attorney General.*

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

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

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

50 5. *If the parties stipulate that the evidence establishes the factual innocence*
51 *of the petitioner, the court may affirm the factual innocence of the petitioner*
52 *without holding a hearing. If the prosecuting attorney does not stipulate that the*

1 *evidence establishes the factual innocence of the petitioner, a determination of*
2 *factual innocence must not be made by the court without a hearing.*

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

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

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

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

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

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

27 **Sec. 10.** ~~[NRS 176.09187 is hereby amended to read as follows:~~
28 ~~176.09187 1. If the results of a genetic marker analysis performed pursuant~~
29 ~~to this section and NRS 176.0918 and 176.09183 are favorable to the petitioner:]~~
30 ~~(a) The], the petitioner may [bring a motion for a new trial] file a petition to~~
31 ~~establish the factual innocence of the petitioner based on [the ground of] newly~~
32 ~~discovered evidence pursuant to [NRS 176.515; and~~
33 ~~(b) The restriction on the time for filing the motion set forth in subsection 3 of~~
34 ~~NRS 176.515 is not applicable.] section 6 of this act.~~

35 ~~2. For the purposes of a genetic marker analysis pursuant to this section and~~
36 ~~NRS 176.0918 and 176.09183, a person who files a petition pursuant to NRS~~
37 ~~176.0918 shall be deemed to consent to the:~~

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

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

41 ~~3. The petitioner shall pay the cost of a genetic marker analysis performed~~
42 ~~pursuant to this section and NRS 176.0918 and 176.09183, unless the petitioner is~~
43 ~~incarcerated at the time the petitioner files the petition, found to be indigent~~
44 ~~pursuant to NRS 171.188 and the results of the genetic marker analysis are~~
45 ~~favorable to the petitioner. If the petitioner is not required to pay the cost of the~~
46 ~~analysis pursuant to this subsection, the expense of an analysis ordered pursuant to~~
47 ~~this section and NRS 176.0918 and 176.09183 is a charge against the Department~~
48 ~~of Corrections and must be paid upon approval by the Board of State Prison~~
49 ~~Commissioners as other claims against the State are paid.~~

50 ~~4. The remedy provided by this section and NRS 176.0918 and 176.09183 is~~
51 ~~in addition to, is not a substitute for and is not exclusive of any other remedy, right~~
52 ~~of action or proceeding available to a person convicted of a crime.] (Deleted by~~
53 ~~amendment.)~~

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

2 ~~176.515 1. The court may grant a new trial to a defendant if required as a~~
3 ~~matter of law, [or on the ground of newly discovered evidence.]~~

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

6 ~~3. [Except as otherwise provided in NRS 176.09187, a motion for a new trial~~
7 ~~based on the ground of newly discovered evidence may be made only within 2~~
8 ~~years after the verdict or finding of guilt.~~

9 ~~4.] A motion for a new trial [based on any other grounds] must be made~~
10 ~~within 7 days after the verdict or finding of guilt or within such further time as the~~
11 ~~court may fix during the 7-day period.] (Deleted by amendment.)~~

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

13 179.275 Where the court orders the sealing of a record pursuant to NRS
14 174.034, 176A.265, 176A.295, 179.245, 179.247, 179.255, 179.259, 179.2595,
15 201.354, 453.3365 or 458.330 **H or section 7 of this act**, a copy of the order must
16 be sent to:

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

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

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

23 179.285 Except as otherwise provided in NRS 179.301:

24 1. If the court orders a record sealed pursuant to NRS 174.034, 176A.265,
25 176A.295, 179.245, 179.247, 179.255, 179.259, 179.2595, 201.354, 453.3365 or
26 458.330 **H or section 7 of this act**:

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

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

- 34 (1) The right to vote;
35 (2) The right to hold office; and
36 (3) The right to serve on a jury.

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

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

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

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

51 4. A person who has had his or her records sealed in this State or any other
52 state may present official documentation that the person has been restored to his or

1 her civil rights or a court order restoring civil rights as proof that the person has
2 been restored to the right to vote, to hold office and to serve as a juror.

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

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

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

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

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

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