

HOUSE BILL NO. 542

INTRODUCED BY S. MORIGEAU

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO POSTCONVICTION RELIEF; PROVIDING THAT A PETITION FOR POSTCONVICTION RELIEF MAY BE FILED WHEN THE STATE FAILS TO TIMELY DISCLOSE FAVORABLE EVIDENCE; PROVIDING POSTCONVICTION RELIEF WHEN THERE IS NEWLY DISCOVERED EVIDENCE OR UNTIMELY DISCLOSED FAVORABLE EVIDENCE; PROVIDING EVIDENTIARY STANDARDS; AMENDING SECTIONS 46-21-102, 46-21-110, AND 46-21-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 46-21-102, MCA, is amended to read:

**"46-21-102. When petition may be filed.** (1) Except as provided in ~~subsection (2)~~ subsections (2) and (3), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter when:

- (a) the time for appeal to the Montana supreme court expires;
- (b) if an appeal is taken to the Montana supreme court, the time for petitioning the United States supreme court for review expires; or
- (c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.

(2) A claim that alleges the existence of newly discovered evidence that, ~~if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted,~~ meets the requirements of 46-21-201(6) may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

(3) A claim that alleges that the state failed to timely disclose favorable evidence to the petitioner as required under the federal and Montana constitutions or state law may be raised in a petition filed within 1 year of the date on which the conviction becomes final or from the date on which the petitioner discovers, or reasonably should have discovered, the existence of the undisclosed evidence, whichever is later. The petition



1 must show, in light of the undisclosed evidence, that there is a reasonable probability of a different outcome at  
2 a new trial. If a petition shows the evidence was intentionally withheld, there is a rebuttable presumption that the  
3 evidence is favorable to the petitioner."

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5 **Section 2.** Section 46-21-110, MCA, is amended to read:

6 **"46-21-110. Petition for DNA testing.** (1) A person convicted of a felony may file a written petition for  
7 performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The  
8 petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that  
9 resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be  
10 verified by the petitioner under penalty of perjury and must:

11 (a) explain why the identity of the perpetrator of the felony was or should have been a significant issue  
12 in the case;

13 (b) present a prima facie case that the evidence to be tested has been subject to a chain of custody  
14 sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated,  
15 altered, or replaced in any material aspect;

16 (c) explain, in light of all the evidence, how the requested testing would establish the petitioner's  
17 innocence of the felony;

18 (d) make every reasonable attempt to identify both the evidence that should be tested and the specific  
19 type of DNA testing sought;

20 (e) reveal the results of any DNA or other known biological testing that was previously conducted by the  
21 prosecution or defense; and

22 (f) state whether a petition was previously filed under this section and the results of the proceeding.

23 (2) If the petition does not contain the information required in subsection (1), the court shall return the  
24 petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing  
25 information.

26 (3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the  
27 attorney general, the county attorney of the county of conviction, and, if known, the laboratory or government  
28 agency holding the evidence sought to be tested. The court shall order that any responses to the petition must  
29 be filed within a reasonable time after the date of service under this subsection.

30 (4) The court may order a hearing on the petition. The hearing must be before the judge who conducted

1 the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in  
2 the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether  
3 or not it was introduced at the trial.

4 (5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay  
5 and that:

6 (a) the evidence sought to be tested is available and has been subject to a chain of custody sufficient  
7 to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any  
8 material aspect;

9 (b) the identity of the perpetrator of the felony was or should have been a significant issue in the case;

10 (c) the petitioner has made a showing that the evidence sought to be tested has a reasonable probability,  
11 assuming favorable results, of being material to the question of whether the petitioner was the perpetrator of the  
12 felony that resulted in the conviction;

13 (d) in light of all the evidence, there is a reasonable probability that the petitioner would not have been  
14 convicted if favorable results had been obtained through DNA testing at the time of the original prosecution; and

15 (e) the evidence sought to be tested was not previously tested or was tested previously but another test  
16 would provide results that are reasonably more discriminating and probative on the question of whether the  
17 petitioner was the perpetrator of the felony that resulted in the conviction or would have a reasonable probability  
18 of contradicting the prior test results.

19 (6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must be  
20 conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney  
21 of the county of conviction. If the parties cannot agree on a laboratory, the court shall direct a laboratory of the  
22 court's choice to conduct the testing. At the request of the attorney general or the county attorney of the county  
23 of conviction, the court shall order the evidence submitted to an additional laboratory designated by the requester  
24 for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties'  
25 interests in the integrity of the evidence and the testing process.

26 (7) After a petition has been filed under this section, the court may order:

27 (a) the state to locate and provide the petitioner with any documents, notes, logs, or reports relating to  
28 physical evidence collected in connection with the case or otherwise assist the petitioner in locating biological  
29 evidence that the state contends has been lost or destroyed;

30 (b) the state to take reasonable measures to locate biological evidence that may be in its custody;

1 (c) the state to assist the petitioner in locating evidence that may be in the custody of a public or private  
2 hospital or laboratory or other facility; and

3 (d) the production of original documents from the laboratory showing the results of any analysis  
4 conducted on any items or biological material collected as evidence from the time the evidence was received to  
5 the time of disposition. This includes but is not limited to the underlying data and laboratory notes prepared in  
6 connection with DNA tests, presumptive tests for the presence of biological material, serological tests, and  
7 analysis for trace evidence. All items from the requested case file must be made available to the petitioner,  
8 including digital files and photographs.

9 (8) The provisions of subsection (7) do not limit a court from ordering the production of any other relevant  
10 evidence.

11 (9) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that  
12 a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give  
13 priority to the DNA testing, the court shall order a laboratory, if located in this state, to give the testing priority over  
14 any other pending casework of the laboratory.

15 (10) The test results must be fully disclosed to the parties.

16 (11) If the test results are inconclusive, the court may order further appropriate testing or terminate the  
17 proceeding. If the test results inculpate the petitioner, the court shall:

18 (a) notify the board of pardons and parole;

19 (b) order the petitioner's test sample to be included in the DNA identification index established under  
20 44-6-102 and the federal combined DNA index system (CODIS) offender database;

21 (c) notify any victim and the family of the victim that the test results were not favorable to the petitioner;  
22 and

23 (d) terminate the proceeding.

24 (12) If the test results are favorable to the petitioner, the court shall order a hearing to determine whether  
25 there is a reasonable probability that a different outcome at trial could have been reached and after the hearing  
26 shall make appropriate orders to serve the interests of justice, including an order that:

27 (a) vacates and sets aside the judgment;

28 (b) discharges the defendant if the defendant is in custody; or

29 (c) resentences the defendant.

30 (13) The court may order a DNA profile to be submitted to the DNA identification index established under

1 44-6-102 and the federal combined DNA index system (CODIS) offender database to determine whether it  
2 matches a DNA profile of a known individual or a DNA profile from an unsolved crime. The DNA profile may be  
3 obtained from probative biological material from crime scene evidence.

4 (14) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is  
5 unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional testing  
6 requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

7 (15) The remedy provided by this section is in addition to any remedy available under ~~part 4~~ of this  
8 chapter.

9 (16) When a motion is filed to vacate a conviction based on DNA results that are favorable to the  
10 petitioner, the state may provide victim services to the victim of the crime that is being reinvestigated during the  
11 reinvestigation, during the court proceedings, and, upon consultation with the victim or a victim advocate, after  
12 final adjudication of the case."

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14 **Section 3.** Section 46-21-201, MCA, is amended to read:

15 **"46-21-201. Proceedings on petition.** (1) (a) Unless the petition and the files and records of the case  
16 conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be sent  
17 to the county attorney in the county in which the conviction took place and to the attorney general and order that  
18 a responsive pleading be filed. The attorney general shall determine whether the attorney general will respond  
19 to the petition and, if so, whether the attorney general will respond in addition to or in place of the county attorney.  
20 Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure  
21 to state a claim for relief or it may proceed to determine the issue.

22 (b) ~~If the death sentence has been imposed, upon receipt of the response or responses~~ Upon receipt  
23 of the response to the petition, the court shall promptly hold a conference to determine a schedule for the  
24 expeditious resolution of the proceeding. The court shall issue a decision within 90 days after the hearing on the  
25 petition or, if there is no hearing, within 90 days after the filing of briefs as allowed by rule or by court order. If the  
26 decision is not issued during that period, a party may petition the supreme court for a writ of mandate or other  
27 appropriate writ or relief to compel the issuance of a decision.

28 (c) To the extent that they are applicable and are not inconsistent with this chapter, the rules of  
29 procedure governing civil proceedings apply to the proceeding.

30 (2) If the death sentence has not been imposed and a hearing is required or if the interests of justice

1 require, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel for  
2 a petitioner who qualifies for the assignment of counsel under Title 46, chapter 8, part 1, and the Montana Public  
3 Defender Act, Title 47, chapter 1.

4 (3) (a) Within 30 days after a conviction for which a death sentence was imposed becomes final, the  
5 sentencing court shall notify the sentenced person that if the person is indigent, as defined in 47-1-103, and  
6 wishes to file a petition under this chapter, the court will order the office of state public defender, provided for in  
7 47-1-201, to assign counsel who meets the Montana supreme court's standards and the office of state public  
8 defender's standards for competency of assigned counsel in proceedings under this chapter for an indigent  
9 person sentenced to death.

10 (b) Within 75 days after a conviction for which a death sentence was imposed upon a person who wishes  
11 to file a petition under this chapter becomes final, the sentencing court shall:

12 (i) order the office of state public defender to assign counsel to represent the person pending a  
13 determination by the office of state public defender that the person is indigent, as defined in 47-1-103, and that  
14 the person either has accepted the offer of assigned counsel or is unable to competently decide whether to  
15 accept the offer of assigned counsel;

16 (ii) if the offer of assigned counsel is rejected by a person who understands the legal consequences of  
17 the rejection, enter findings of fact after a hearing, if the court determines that a hearing is necessary, stating that  
18 the person rejected the offer with an understanding of the legal consequences of the rejection; or

19 (iii) if the petitioner is determined not to be indigent, deny or rescind any order requiring the assignment  
20 of counsel.

21 (c) The office of state public defender may not assign counsel who has previously represented the  
22 person at any stage in the case unless the person and the counsel expressly agree to the assignment.

23 (d) If a petitioner entitled to counsel under this subsection (3) is determined not to be indigent but  
24 becomes indigent at any subsequent stage of the proceedings, the court shall order the assignment of counsel  
25 as provided in subsection (3)(b)(i).

26 (e) The expenses of counsel assigned pursuant to this subsection (3) must be paid by the office of state  
27 public defender.

28 (f) Violation of this subsection (3) is not a basis for a claim or relief under this chapter.

29 (4) The court, for good cause, may grant leave to either party to use the discovery procedures available  
30 in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner that the

1 court has ordered or to which the parties have agreed.

2 (5) The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In its  
3 discretion, the court may order the petitioner brought before the court for the hearing.

4 (6) (a) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the  
5 judgment or sentence in the former proceedings and any supplementary orders as to reassignment, retrial,  
6 custody, bail, or discharge that may be necessary and proper. If the court finds for the prosecution, the petition  
7 must be dismissed. If the petitioner's newly discovered evidence, when viewed in light of the evidence as a whole,  
8 establishes a reasonable probability of a different outcome at a new trial, the court shall vacate the conviction and  
9 order a new trial.

10 (b) If the petitioner's newly discovered evidence, when viewed in light of the evidence as a whole,  
11 establishes by clear and convincing evidence that the petitioner would not have been convicted, the court shall  
12 vacate the conviction with prejudice.

13 (7) (a) Except as provided in subsection (7)(b), if the petitioner meets the requirements of 46-21-102(3),  
14 the court shall grant a new trial.

15 (b) If the court determines the undisclosed evidence under 46-21-102(3) would entitle the petitioner to  
16 the relief under subsection (6)(b), the court shall vacate the conviction with prejudice.

17 (8) If, after applying the applicable evidentiary standards provided in subsections (6) and (7), the court  
18 finds in favor of the petitioner, the court shall enter an appropriate order with respect to the judgment or sentence  
19 in the former proceedings and any supplementary orders as to reassignment, retrial, custody, bail, or discharge  
20 that may be necessary and proper. If the court finds for the prosecution, the petition must be dismissed."

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22 NEW SECTION. Section 4. Effective date. [This act] is effective on passage and approval.

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