

HOUSE BILL NO. 746

INTRODUCED BY L. SHELDON-GALLOWAY

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A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A MONTANA INNOCENCE INQUIRY COMMISSION; PROVIDING FOR APPOINTMENT OF THE COMMISSION, TERMS OF OFFICE, AND COMMISSION STAFF; PROVIDING THAT THE COMMISSION REVIEW CLAIMS OF INNOCENCE; PROVIDING A PROCESS FOR THE COMMISSION TO RECOMMEND JUDICIAL REVIEW OF CERTAIN CONVICTIONS; PROVIDING RULEMAKING AUTHORITY; PROVIDING DEFINITIONS; AND PROVIDING A DELAYED EFFECTIVE DATE."

WHEREAS, postconviction review of credible claims of factual innocence supported by verifiable evidence not previously presented or evident at trial or at a hearing granted through postconviction relief should be addressed as expeditiously as possible to ensure the innocent as well as the guilty receive justice; and

WHEREAS, public confidence in the justice system is strengthened by a thorough and timely inquiry into claims of factual innocence; and

WHEREAS, factual claims of innocence, which are determined to be credible, can most effectively be evaluated through a complete and independent investigation and review.

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

NEW SECTION. **Section 1. Purpose.** The purpose of [sections 1 through 13] is to establish an extraordinary procedure to investigate and determine credible claims of factual innocence that require an individual to voluntarily waive rights and privileges as described in [sections 1 through 13].

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 13], unless the context clearly indicates otherwise, the following definitions apply:

(1) "Claim of factual innocence" means a claim on behalf of a living person convicted of a felony in the state, asserting the complete innocence of any criminal responsibility for the felony for which the person

1 was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there
2 is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered
3 at a hearing granted through postconviction relief.

4 (2) "Claimant" means a person asserting that they are completely innocent of any criminal
5 responsibility for a felony crime on which the person was convicted and for any other reduced level of criminal
6 responsibility relating to the crime.

7 (3) "Commission" means the Montana innocence inquiry commission established in [section 3].

8 (4) "Director" means the director of the Montana innocence inquiry commission.

9 (5) "Formal inquiry" means the stage of an investigation when the commission has entered into a
10 signed agreement with the original claimant and the commission has made efforts to notify the victim.

11 (6) "Victim" means the victim of the crime, or if the victim of the crime is deceased, the next of kin
12 of the victim.

13

14 NEW SECTION. Section 3. Commission established -- rulemaking authority. (1) There is
15 established the Montana innocence inquiry commission. The commission is an independent commission
16 attached to the office of court administrator for administrative purposes only as provided in 2-15-121.

17 (2) The office of court administrator shall provide administrative support to the commission as
18 needed. The office of court administrator may not reduce or modify the budget of the commission or use funds
19 appropriated to the commission without the approval of the commission. The office of court administrator shall
20 conduct an annual audit of the commission.

21 (3) The commission shall adopt rules to implement the provisions of [sections 1 through 13].

22

23 NEW SECTION. Section 4. Appointing authority -- chair -- meetings -- quorum. (1) The
24 commission is composed of eight voting members appointed as follows:

25 (a) one district court judge appointed by the chief justice of the supreme court; and

26 (b) seven members appointed by the governor as follows:

27 (i) one prosecuting attorney;

28 (ii) one victim advocate;

- 1 (iii) one person engaged in the practice of criminal defense law;
- 2 (iv) one person who was wrongfully convicted or a family member of a person who was wrongfully
3 convicted;
- 4 (v) one sheriff holding office at the time of appointment; and
- 5 (vi) two public members who are not attorneys and who are not officers or employees of the judicial
6 branch.

7 (2) The appointing authority shall also appoint alternate commission members for the commission
8 members appointed to serve in the event of scheduling conflicts, conflicts of interest, disability, or other
9 disqualification arising in a particular case. The alternate members must have the same qualifications for
10 appointment as the original member. In making the appointments, the appointing authority shall make a good
11 faith effort to appoint members with different perspectives of the justice system. The appointing authority shall
12 also consider geographical location, gender, and racial diversity in making the appointments.

13 (3) The district court judge who is appointed as a member shall serve as chair of the commission.
14 The commission shall hold its initial meeting no later than January 31, 2024, at the call of the chair. The
15 commission shall meet a minimum of once every 6 months and may also meet more often at the call of the
16 chair. The commission shall meet at the time and place designated by the chair. Notice of the meetings must be
17 given at the time and in the manner provided by the rules of the commission. A majority of the members
18 constitutes a quorum. All commission votes must be by majority vote unless otherwise specified.

19

20 **NEW SECTION. Section 5. Terms of members -- compensation -- expenses.** (1) Of the initial
21 members, two appointments must be for 1-year terms, three appointments must be for 2-year terms, and three
22 appointments must be for 3-year terms. After that time, all terms must be for 3 years. Members of the
23 commission may serve no more than two consecutive 3-year terms plus any initial term of less than 3 years.
24 Unless provided otherwise, all terms of members begin on January 1 and end on December 31.

25 (2) Members serving by virtue of elective or appointive office, except for the sheriff, may serve only
26 as long as the members hold those respective offices. The commission may remove a member for cause.
27 Vacancies occurring before the expiration of a term must be filled in the manner provided for the members first
28 appointed.

1 (3) The commission members may not receive a salary for serving. All commission members may
2 receive per diem and travel expenses.

3

4 NEW SECTION. Section 6. Director and other staff. (1) The commission shall employ a director.
5 The director shall report to the commission. The director must be an attorney licensed to practice in the state at
6 the time of appointment and at all times during service as director. The director shall assist the commission in
7 developing rules and standards for cases accepted for review, coordinate investigation of cases accepted for
8 review, maintain records for all case investigations, prepare reports outlining commission investigations and
9 recommendations to the trial court, and apply for and accept on behalf of the commission any funds that may
10 become available from government grants, private gifts, donations, or devises from any source.

11 (2) Subject to the approval of the chair, the director shall employ other staff and shall contract for
12 services as necessary to assist the commission in the performance of its duties and as funds permit.

13 (3) The office of court administrator shall provide office space for the commission and the
14 commission staff.

15

16 NEW SECTION. Section 7. Duties. The commission has the following duties and powers:

17 (1) to establish the criteria and screening process to be used to determine which cases are
18 accepted for review;

19 (2) to conduct inquiries into claims of factual innocence, with priority given to those cases in which
20 the convicted person is currently incarcerated solely for the crime for which the person claims factual
21 innocence;

22 (3) to coordinate the investigation of cases accepted for review;

23 (4) to maintain records for all case investigations;

24 (5) to prepare written reports outlining commission investigations and recommendations to the trial
25 court at the completion of each inquiry; and

26 (6) to apply for and accept any funds that become available for the commission's work from
27 government grants, private gifts, donations, or devises from any source.

28

1 **NEW SECTION. Section 8. Claims of innocence.** (1) A claim of factual innocence for any conviction
2 may be referred to the commission by a court, a state or local agency, or a claimant's counsel or may be made
3 directly by the claimant. The commission may not consider a claim of factual innocence if the convicted person
4 is deceased. A claimant who received notice pursuant to subsection (3)(b) and did not make a claim of factual
5 innocence is barred from investigation of a claim of factual innocence by the commission absent a showing of
6 good cause and approval of the commission chair. The determination of whether to grant a formal inquiry
7 regarding any other claim of factual innocence is in the discretion of the commission. The commission may
8 informally screen and dismiss a case summarily at its discretion.

9 (2) (a) A formal inquiry into a claim of innocence may not be made by the commission unless the
10 director or the director's designee first obtains a signed agreement from the convicted person in which the
11 convicted person waives the convicted person's procedural safeguards and privileges, agrees to cooperate with
12 the commission, and agrees to provide full disclosure regarding all inquiry requirements of the commission. The
13 waiver under this subsection (2)(a) does not apply to matters unrelated to a convicted person's claim of
14 innocence. The convicted person has the right to advice of counsel prior to the execution of the agreement and,
15 if a formal inquiry is granted, throughout the formal inquiry. If counsel represents the convicted person, then the
16 convicted person's counsel must be present at the signing of the agreement. If counsel does not represent the
17 convicted person, the commission chair shall determine the convicted person's indigency status and, if
18 appropriate, enter an order for the appointment of a public defender for the purpose of advising on the
19 agreement. If the convicted person has requested a specific attorney with knowledge of the case, the director
20 shall inform the office of state public defender of the request for their consideration.

21 (b) Forensic testing and claimant interviews may not be conducted by the commission prior to
22 obtaining a signed agreement from the convicted person.

23 (3) (a) If a formal inquiry regarding a claim of factual innocence is granted, the director shall use all
24 due diligence to notify the victim in the case and explain the inquiry process. The commission shall give the
25 victim notice that the victim has the right to present the victim's views and concerns throughout the
26 commission's investigation.

27 (b) Absent a showing of good cause and approval of the commission chair, if a formal inquiry
28 regarding a claim of factual innocence is granted, the commission shall use all due diligence to notify each

1 codefendant of the claim that an investigation will be conducted and that if the codefendant wishes to file a
2 claim as well, the codefendant shall file within 60 days from receipt of the notice or the codefendant's claim may
3 be barred from future investigation by the commission.

4 (c) If a formal inquiry regarding a claim of factual innocence is granted, the director shall provide a
5 confidential case status update for each case in formal inquiry to the county attorney, the convicted person, and
6 defense counsel, if any, at least once every 6 months. If there is no defense counsel, the update must be
7 provided to the county attorney, the convicted person, and referring counsel, if any. The case status update
8 must include a summary of the actions taken since the last update and the results of any forensic testing that
9 has been conducted.

10 (4) (a) The commission may use any measure provided in Title 46 and the Montana Rules of Civil
11 Procedure to obtain information necessary to its inquiry. The commission may also do any of the following:

12 (i) issue process to compel the attendance of witnesses and the production of evidence;

13 (ii) administer oaths;

14 (iii) petition the district court of the first judicial district or the original jurisdiction for enforcement of
15 process or for other relief; and

16 (iv) prescribe its own rules of procedure.

17 (b) All challenges with regard to the commission's authority or the commission's access to
18 evidence must be heard by the commission chair in the chair's judicial capacity, including any required in
19 camera review.

20 (5) While performing duties for the commission, the director or the director's designee may serve
21 subpoenas or other process issued by the commission throughout the state in the same manner and with the
22 same effect as an officer authorized to serve process.

23 (6) All state discovery and disclosure statutes in effect at the time of formal inquiry are enforceable
24 as if the convicted person were currently being tried for the charge for which the convicted person is claiming
25 innocence.

26 (7) If, at any point during an inquiry, the convicted person refuses to comply with requests of the
27 commission or is otherwise considered to be uncooperative by the commission, the commission shall
28 discontinue the inquiry.

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2 **NEW SECTION. Section 9. Commission proceedings.** (1) At the completion of a formal inquiry, all
3 relevant evidence must be presented to the full commission in a public hearing. Any public hearing held in
4 accordance with this section is subject to the commission's rules of operation. The commission's rules of
5 operation may not exclude the county attorney or defense counsel from any portion of the hearing.

6 (2) The commission may compel the testimony of a witness. If a witness asserts the witness's
7 privilege against self-incrimination in a proceeding under [sections 1 through 13], the commission chair, in the
8 chair's judicial capacity, may order the witness to testify or produce other information if the chair first determines
9 that the witness's testimony will likely be material to the investigation and necessary to reach a correct factual
10 determination in the case at hand. However, the commission chair may not order the witness to testify or
11 produce other information that would incriminate the witness in the prosecution of any offense other than an
12 offense for which the witness is granted immunity under this subsection. The order must prevent a prosecutor
13 from using the compelled testimony, or evidence derived from the compelled testimony, to prosecute the
14 witness for previous false statements made under oath by the witness in prior proceedings. The prosecutor has
15 a right to be heard by the commission chair prior to the chair issuing the order. When granted, the immunity
16 applies throughout all proceedings conducted pursuant to [sections 1 through 13]. The limited immunity granted
17 under this section may not prohibit prosecution of statements made under oath that are unrelated to the
18 commission's formal inquiry, false statements made under oath during proceedings under [sections 1
19 through 13], or prosecution for any other crimes.

20 (3) (a) The commission shall include, as part of its rules of operation, the holding of a prehearing
21 conference to be held at least 10 days prior to any proceedings of the full commission. Only the following
22 persons may be notified and authorized to attend the prehearing conference:

23 (i) the county attorney, or the county attorney's designee, of the district where the claimant was
24 convicted of the felony on which the claim of factual innocence is based;

25 (ii) the claimant and the claimant's counsel, if any;

26 (iii) the chair of the commission;

27 (iv) the director of the commission; and

28 (v) any commission staff designated by the director.

1 (b) The county attorney, or the county attorney's designee, must be provided:

2 (i) an opportunity to inspect any evidence that may be presented to the commission that has not
3 previously been presented to any judicial officer or body; and

4 (ii) any information that the county attorney, or the county attorney's designee, considers relevant
5 to the proceedings.

6 (c) At least 72 hours prior to any commission proceedings, the county attorney, or the county
7 attorney's designee, is authorized to provide the commission with a written statement, which is part of the
8 record.

9 (4) The director shall use all due diligence to notify the victim at least 30 days prior to any
10 proceedings of the full commission held in regard to the victim's case. The commission shall notify the victim
11 that the victim is permitted to attend proceedings otherwise closed to the public, subject to any limitations
12 imposed by [sections 1 through 13]. If the victim plans to attend proceedings otherwise closed to the public, the
13 victim shall notify the commission at least 10 days in advance of the proceedings of the victim's intent to attend.

14 (5) (a) After hearing the evidence, the full commission shall vote to establish further case
15 disposition as provided by this subsection (5). All eight voting members of the commission shall participate in
16 the vote.

17 (b) Except in cases in which the convicted person entered and was convicted on a plea of guilty, if
18 five or more of the eight voting members of the commission conclude there is sufficient evidence of factual
19 innocence to merit judicial review, the case must be referred to the district court judge in the district of original
20 jurisdiction by filing with the clerk of court the opinion of the commission with supporting findings of fact, as well
21 as the record in support of the opinion, with service on the convicted person or the convicted person's counsel,
22 if any, and the county attorney in noncapital cases or service on both the county attorney and attorney general
23 in capital cases. In cases in which the convicted person entered and was convicted on a plea of guilty, if all
24 eight voting members of the commission conclude there is sufficient evidence of factual innocence to merit
25 judicial review, the case must be referred to the district court judge in the district of original jurisdiction.

26 (c) If less than five of the eight voting members of the commission, or in cases in which the
27 convicted person entered and was convicted on a plea of guilty, less than all eight voting members of the
28 commission, conclude there is sufficient evidence of factual innocence to merit judicial review, the commission

1 shall conclude there is insufficient evidence of factual innocence to merit judicial review. The commission shall
2 document that opinion, along with supporting findings of fact, and file those documents and supporting
3 materials with the clerk of district court in the district of original jurisdiction, with a copy to the convicted person
4 or the convicted person's counsel, if any, the county attorney, and the district court judge.

5 (d) The director shall use all due diligence to immediately notify the victim of the commission's
6 conclusion in a case.

7 (6) Evidence of criminal acts, professional misconduct, or other wrongdoing disclosed through
8 formal inquiry or commission proceedings must be referred to the appropriate authority. Evidence favorable to
9 the convicted person disclosed through formal inquiry or commission proceedings must be disclosed to the
10 convicted person and the convicted person's counsel, if the convicted person has counsel.

11 (7) All proceedings of the commission must be recorded and transcribed as part of the record. All
12 commission member votes must be recorded in the record. The supporting records for the commission's
13 conclusion that there is sufficient evidence of factual innocence to merit judicial review, including all files and
14 materials considered by the commission and a full transcript of the hearing before the commission, become
15 public when filed with the district court as required in subsection (5). Commission records for conclusions of
16 insufficient evidence of factual innocence to merit judicial review must remain confidential, except as provided
17 in subsection (6).

18 (8) At any point in the formal inquiry regarding a claim of factual innocence, the county attorney
19 and the convicted person or the convicted person's counsel may agree that there is sufficient evidence of
20 factual innocence to merit judicial review by the three-judge panel and bypass the commission. The director
21 and the chair of the commission must be notified in writing of this agreement.

22 (9) Except as otherwise provided in this section, all files and records not filed with the clerk of
23 district court or presented at the commission hearings are confidential and exempt from the public record. If the
24 commission concludes there is sufficient evidence of factual innocence to merit judicial review, the commission
25 shall make a copy of the entire file available to the county attorney and defense counsel. On availability, the
26 commission shall provide the county attorney and defense counsel a copy of the uncertified and certified
27 transcript of the commission's proceedings. Absent a judicial finding of malicious conduct, the commission and
28 commission staff are not civilly liable for acting in compliance with this subsection.

1 (10) With respect to the evidence presented to the three-judge panel, the county attorney and
2 defense counsel may determine which evidence, if any, will be presented to the three-judge panel.

3
4 NEW SECTION. Section 10. Postcommission three-judge panel. (1) (a) If the commission
5 concludes or the county attorney and the convicted person's counsel agree, pursuant to [section 9(8)], there is
6 sufficient evidence of factual innocence to merit judicial review, the chair of the commission shall request the
7 chief justice to appoint a three-judge panel, not to include any trial judge that has had substantial previous
8 involvement in the case, and issue commissions to the members of the three-judge panel to convene a special
9 session of the district court of the original jurisdiction to hear evidence relevant to the commission's
10 recommendation. The senior judge of the panel shall preside. The chief justice shall appoint the three-judge
11 panel within 20 days of the filing of the commission's opinion finding sufficient evidence of factual innocence to
12 merit judicial review.

13 (b) If the commission concludes that there is credible evidence of prosecutorial misconduct in the
14 case, the chair of the commission may request the attorney general to appoint a special prosecutor to represent
15 the state in lieu of the county attorney of the county of conviction or the county attorney's designee. The request
16 for the special prosecutor must be made within 20 days of the filing of the commission's opinion finding
17 sufficient evidence of innocence to merit judicial review.

18 (c) On receipt of a request under this subsection (1) to appoint a special prosecutor, the attorney
19 general may temporarily assign a county attorney, assistant county attorney, or other qualified attorney to
20 represent the state at the hearing before the three-judge panel. However, the attorney general may not appoint
21 as special prosecutor any attorney who prosecuted or assisted with the prosecution in the trial of the convicted
22 person or who is a prosecuting attorney in the county where the convicted person was tried. The appointment
23 must be made no later than 20 days after the receipt of the request.

24 (2) (a) The district court judge in the district of original jurisdiction shall enter an order setting the
25 case for hearing at the special session of district court for which the three-judge panel is commissioned and
26 shall require the state to file a response to the commission's opinion within 30 days of the date of the order. The
27 response, at the time of original filing or through amendment at any time before or during the proceedings, may
28 include joining the defense in a motion to dismiss the charges with prejudice on the basis of innocence.

1 (b) The commission's entire file, including files obtained from other agencies, must be
2 unencumbered by protective orders when transferred to the county attorney and defense counsel pursuant to
3 [section 9(9)], unless either of the following apply:

4 (i) the county attorney and defense counsel have consented to a protective order over a portion of
5 the file; or

6 (ii) the county attorney and defense counsel have been given an opportunity to be heard by the
7 senior judge of the three-judge panel before a protective order is issued.

8 (3) The county attorney of the district of conviction, or the county attorney's designee, shall
9 represent the state at the hearing before the three-judge panel, except as otherwise provided by this section.

10 (4) The three-judge panel shall conduct an evidentiary hearing. At the hearing, the court and the
11 defense and prosecution through the court may compel the testimony of any witness, including the convicted
12 person. All credible, verifiable evidence relevant to the case, even if considered by a jury or judge in a prior
13 proceeding, may be presented during the hearing. The convicted person may not assert any privilege or
14 prevent a witness from testifying. The convicted person has a right to be present at the evidentiary hearing and
15 to be represented by counsel. A waiver of the right to be present must be in writing.

16 (5) The district court judge in the district of original jurisdiction shall determine the convicted
17 person's indigency status and, if appropriate, enter an order for the appointment of counsel by the office of state
18 public defender. If the convicted person has requested a specific attorney with knowledge of the case, the
19 director shall inform the office of state public defender of that request for their consideration. The court may also
20 enter an order relieving an indigent convicted person of all or a portion of the costs of the proceedings.

21 (6) The clerk of court shall provide written notification to the victim 30 days prior to any case-
22 related hearings.

23 (7) On the motion of either party, the senior judge of the panel may direct the attorneys for the
24 parties to appear before the judge for a conference on any matter in the case.

25 (8) The three-judge panel shall rule as to whether the convicted person has proved by clear and
26 convincing evidence that the convicted person is innocent of the charges. The determination requires a
27 unanimous vote. If the vote is unanimous, the panel shall enter dismissal of all or any of the charges. If the vote
28 is not unanimous, the panel shall deny relief.

1 (9) A person who is determined by the three-judge panel to be innocent of all charges and against
2 whom the charges are dismissed pursuant to this section is eligible for compensation without obtaining a
3 pardon of innocence from the governor.

4
5 NEW SECTION. **Section 11. No right to further review by commission or three-judge panel.** (1)
6 Unless otherwise authorized by [sections 1 through 13], the decisions of the commission and of the three-judge
7 panel are final and are not subject to further review by appeal, certification, writ, motion, or otherwise by the
8 commission.

9 (2) A claim of factual innocence asserted through the commission does not adversely affect the
10 convicted person's rights to other postconviction relief and appeals.

11
12 NEW SECTION. **Section 12. Preservation of files and evidence.** (1) On receiving written notice
13 from the commission of a commission inquiry, the state shall preserve all files and evidence subject to
14 disclosure. When the commission provides written notice to the state that the commission's inquiry is complete,
15 the duty to preserve under this section must cease. However, other preservation requirements may be
16 applicable.

17 (2) The commission is entitled to a copy of all records preserved under subsection (1), including
18 access to inspect and examine all physical evidence.

19 (3) On request of the commission, the state shall transfer custody of physical evidence to the
20 commission's director, or the director's designee, for forensic and DNA testing. The commission shall preserve
21 evidence in a manner reasonably calculated to prevent contamination or degradation of any biological evidence
22 that may be present, while subject to a continuous chain of custody and securely retained with sufficient official
23 documentation to locate the evidence. At or prior to the completion of the commission's inquiry, the commission
24 shall return all remaining evidence.

25 (4) The commission has the right to subject physical evidence to forensic and DNA testing,
26 including consumption of biological material, as necessary for the commission's inquiry. If testing complies with
27 federal bureau of investigation requirements and the data meets national DNA index system criteria, profiles
28 obtained from the testing must be searched and uploaded to the combined DNA index system. The commission

1 shall incur all costs associated with ensuring compliance with federal bureau of investigation requirements and
2 national DNA index system criteria.

3
4 **NEW SECTION. Section 13. Reports.** The commission shall report, in accordance with 5-11-210,
5 biennially by September 15 of each even-numbered year on its activities to the law and justice interim
6 committee provided for in 5-5-226. The report may contain recommendations of any needed legislative changes
7 related to the activities of the commission. The report must recommend the funding needed by the commission
8 and the county attorneys in order to meet their responsibilities under [sections 1 through 13].
9 Recommendations concerning the county attorneys may only be made after consultations with the Montana
10 county attorneys association and the attorney general.

11
12 **NEW SECTION. Section 14. Codification instruction.** [Sections 1 through 13] are intended to be
13 codified as a new chapter in Title 46, and the provisions of Title 46 apply to [sections 1 through 13].

14
15 **NEW SECTION. Section 15. Effective date.** [This act] is effective January 1, 2024.

16 - END -