

NEVADA ENACTS SWEEPING CRIMINAL JUSTICE REFORM

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I. Introduction

During the 2017 Session of the Nevada Legislature a Democrat controlled Legislature passed and a Republican Governor signed into law no less than eight significant measures¹ aimed at broad sweeping criminal justice reform. While the definition of “criminal justice” has been debated for centuries by political theorists, practitioners, academics and policy makers, and the meaning of “reform” may be subject to many varied interpretations, this paper examines and highlights the principal legislation that Nevada enacted in an effort to remove certain barriers to voting, civic service, employment and the like for persons previously convicted of a criminal offense. These barriers are often referred to as “collateral consequences” which are initiated by a criminal conviction and continue to accrue long after a term of probation or parole or a prison sentence is served. As Senate Majority Leader Aaron Ford stated during testimony relating to the issue of the restoration of civil rights, “Reintegration into society is essential for the safety of communities and reduction of recidivism among those who have been incarcerated.”²

II. Civil Rights Restoration

According to the Brennan Center for Justice, “Nevada has one of the most complex disenfranchisement laws in the country.”³ In light of that statement, Assembly Bill No. 181 (2017), which becomes effective January 1, 2019, amends Nevada law to remove, for certain purposes relating to the restoration of civil rights, the distinction between “honorable” and “dishonorable” discharge from probation or parole. Under existing Nevada law, probationers and parolees are only eligible for automatic restoration of the right to vote and to serve on a civil jury if they have been honorably discharged. Honorable discharge by statutory definition means, a person who: (a) has fulfilled the conditions of probation for the entire period; (b) is recommended for earlier discharge by the Division of Parole and Probation; or (c) has demonstrated fitness for honorable discharge but because of economic hardship, verified by the Division, has been unable to make restitution as ordered by the court.⁴ Conversely, a dishonorable discharge is defined under current Nevada law as a defendant whose term of supervision has expired and: (a) whose whereabouts are unknown; (b) who has failed to make restitution in full as ordered by the court, without a verified showing of economic hardship; or (c) who has otherwise failed to qualify for an honorable discharge.⁵ The provisions of AB 181 remove this distinction between honorable and dishonorable discharge and extend the automatic restoration of the right to vote and serve on a civil jury to persons who were not honorably discharged from probation or parole.

It is also important to note under the provisions of AB 181, a person convicted of a category B felony involving the use of force or violence must wait 2 years after his or her discharge from probation or parole or completion of sentence before regaining the right to vote. The net effect of

this statutory change is to actually increase the waiting period for the restoration of the right to vote for certain types of forceful or violent offenses.

As Assembly Speaker Jason Frierson testified on AB 181, “Let me be clear, AB 181 is not designed to be soft on crime or cut a break to felons. To the contrary, AB 181 is designed to acknowledge that, in our criminal justice system, felons are given a sentence that is intended to reflect the appropriate punishment for the crime. However, at the end of that period of time set forth to reflect the appropriate punishment, that person is then expected to reenter the community and become a productive member of society.”⁶

It should also be noted that earlier versions of AB 181 and related pieces of legislation introduced during the 2017 Legislative Session, sought to further extend the automatic restoration of rights to persons convicted of: (1) a category A felony, the most serious category of felony in Nevada; (2) a category B felony resulting in substantial bodily harm; and (3) repeat felonies. However, those attempts did not pass. Under current Nevada law, such persons are still required to seek a full restoration of their rights by petition to a court of competent jurisdiction or through the Nevada Board of Pardons Commissioners.⁷

III. Sealing of Records

Existing Nevada law authorizes a person who was: (1) convicted of certain offenses; (2) arrested for alleged criminal conduct but the charges against the person were dismissed or the prosecuting attorney declined prosecution of the charges; or (3) acquitted of the charges, to petition the court in which the person was convicted or in which the charges were dismissed or declined for prosecution or the acquittal was entered for the sealing of all records relating to the conviction or the arrest and proceedings leading to the dismissal, declination or acquittal, as applicable.⁸ Existing Nevada law also requires: (1) a person to wait a specified number of years, depending on the offense, until he or she may petition the court for the sealing of such records; and (2) a petition to be accompanied by the person’s current verified records received from the Central Repository for Nevada Records of Criminal History and all agencies of criminal justice which maintain such records within the city or county in which the petitioner appeared in court.⁹

Senate Bill No. 125 (2017) and Assembly Bill No. 327 (2017) were both passed by the Nevada Legislature during the 2017 Legislative Session and became effective on October 1, 2017. During a committee hearing on AB 327, Assemblyman Steve Yeager, Chair of the Assembly Committee on Judiciary, stated, “the intent of the measure seeks to remedy the State’s cumbersome sealing of former inmates’ records.”¹⁰ Further, Assemblyman Yeager testified, “In August 2016, there was a record-sealing clinic at the Doolittle Community Center in Las Vegas presented by the Legal Aid Center of Southern Nevada. We brought in everyone involved in record sealing: district attorneys, defense attorneys, judges, the Central Repository for Nevada Records of Criminal History, Legislators and the LVMPD. Public demand was greater than anticipated with lines out the door. We worked for many hours only to find many people still could not get their records sealed. A result of that clinic was a desire to root out problematic areas in the Nevada’s record sealing statutes, to make the process more equitable and fair for all involved.”¹¹

Both measures reduced the length of certain periods that a person is required to wait before petitioning the court in which the person was convicted for the sealing of all records relating to a

conviction from: (a) 15 to 10 years for category A felony, a crime of violence or a burglary of a residence; (b) 15 to 5 years for a category B felony, except for a crime of violence or a burglary of a residence; (c) 12 to 5 years for a category C or D felony; (d) 7 to 2 years for a category E felony; (e) 5 to 2 years for a gross misdemeanor; and (f) 2 years to 1 year for certain misdemeanors.

The waiting periods for misdemeanors relating to Medicaid fraud, driving under the influence and domestic violence were not amended, and remain at 7 years. The legislative intent for not reducing the time period for these certain offenses was that some misdemeanors may be stacked for a 7 year time period before the multiple misdemeanors give rise to the level of a felony and thus it may become impossible to track such convictions if they were sealed. Additionally, pursuant to a request from the City Attorneys and District Attorneys within the State, misdemeanors for certain batteries, harassment, stalking or a violation of certain temporary or extended orders were left unchanged and remain at 2 years. Finally, pursuant to existing Nevada law, certain offenses such as a crime against a child, sexual offenses, and other offenses were not amended by SB 125 or AB 327 and may not be sealed.¹²

AB 327 makes many of the same changes as SB 125 regarding sealing of records; however, several additional and notable changes were also included in the measure. First, AB 327 included a legislative declaration that “the public policy of this State is to favor the giving of second chances to offenders who are rehabilitated and the sealing of the records of such persons.” The bill also seeks to simplify the sealing process by permitting a court to grant a petition to seal without a hearing, if the prosecutor stipulates, and further reduces the number of criminal history records that must be submitted with a petition. The legislation creates a rebuttable presumption in favor of sealing if all statutory eligibility criteria are satisfied. The bill authorizes a person who is given a dishonorable discharge from probation to apply to the court for the sealing of records relating to the conviction if he or she is otherwise eligible to have the records sealed; however, the bill provides that the rebuttable presumption in favor of relief does not apply to those persons dishonorably discharged. Lastly, the waiting period for the sealing of the records of a person who completes a correctional or judicial program for reentry into the community is reduced from 5 years to 4 years after the completion of such a program.

As a key policy component of the measure, the bill authorizes the district court to order the sealing of any records in the justice or municipal courts under certain circumstances. This was referred to in testimony by Assemblyman Steve Yeager as the “superseal,” which gives district courts the ability to seal records from justice, municipal and juvenile courts.¹³ As Assemblyman Yeager noted under current law, “if someone has a conviction in those various jurisdictions, he or she would have to go to eight or nine different courts.”¹⁴

Of note, with certain limited exceptions pursuant to existing Nevada law, if the court orders a person’s record sealed, “all proceedings recounted in the record are deemed never to have occurred and the person to whom the order pertains may properly answer accordingly to any inquiry, including, without limitation, an inquiry relating to an application for employment...”¹⁵ However, also pursuant to Nevada law, sealed records may be inspected under certain circumstances, including, for: purposes relating to investigations concerning gaming and insurance licensing; certain actions by prosecuting attorneys; certain law enforcement uses; and use by the State Board of Pardons Commissioners.¹⁶

Assembly Bill No. 243 (2017) became effective on October 1, 2017. The measure specifically authorizes a person convicted of certain offenses relating to prostitution, and who was a victim of sex trafficking or involuntary servitude, to petition the court to vacate the judgment and seal all documents relating to the case. The measure sets forth the procedure for vacating the judgment of conviction and requires the court to notify the Central Repository for Nevada Records of Criminal History, the Office of the Attorney General, each office of the district attorney and every law enforcement agency in this State. The court is also required to allow any person who wishes to testify and present evidence on behalf of such an entity, to do so, before the court decides whether to grant a petition. Finally, the bill authorizes a court to enter an order to vacate a judgment of conviction if the petitioner satisfies all requirements necessary for the judgment to be vacated even if the petition is deficient with respect to the sealing of the petitioner's record.

IV. Ban the Box in Public Employment

Assembly Bill No. 384 (2017), which became effective January 1, 2018, provides, with certain exceptions, that the criminal history of an applicant or other qualified person under consideration for employment in a Nevada state agency or local government may be considered only after the earliest of: (a) the final in-person interview; (b) a conditional offer of employment; or (c) if applicable, the applicant's certification by the Administrator of the Division of Human Resource Management of the Department of Administration. The legislation was supported by numerous proponents including the National Employment Law Project, and according to testimony the "ban the box" movement has been embraced across the country, beginning in the late 1990's with Hawaii.¹⁷ According to the National Employment Law Project, ban the box policies have now been implemented in 29 states, including Nevada.¹⁸

AB 384 created certain exceptions, wherein consideration may be given to the criminal history of an applicant at the outset of the selection process if he or she is disqualified from employment pursuant to a specific State or Federal law. The ban the box provisions also do not apply to peace officers, firefighters or any applicant for a job that allows direct or indirect access to certain criminal databases or information.

AB 384 also sets forth factors that must be considered by an appointing authority or the Administrator before the criminal history of an applicant may be used as the basis for rescinding a conditional job offer or for rejection of the applicant. Additionally, if an applicant's criminal history serves as the basis for rescinding a conditional offer of employment, such rescission is required to: (1) be made in writing; (2) specify that the criminal history was the reason for the rejection; and (3) provide an opportunity to discuss the rescission with the human resources director for the appointing authority. Finally, the bill provides that it is an unlawful employment practice for an employer to fail to follow certain procedures when considering the criminal history of an applicant and provides that the applicant in such a case may file a complaint with the Nevada Equal Rights Commission, regardless of whether the complaint is based on race, color, sex, or any other characteristic enumerated in existing law.

V. Sentence Deductions

Assembly Bill No. 25 (2017) became effective July 1, 2017, and provides that for the purpose of determining whether a probationer or a parolee is allowed a deduction from his or her period of probation or sentence, respectively, the person is deemed to be current with any fee to defray the

costs of his or her supervision and any payment of restitution for any given month if, during that month, the person makes at least the minimum monthly payment established by the court, the Division of Parole and Probation, or the State Board of Parole Commissioners, as applicable.

The bill also provides that, if the Governor determines by executive order that it is necessary, the Governor may authorize the deduction of up to 5 days from a sentence for each month an offender serves. This provision must be uniformly applied to all offenders under a sentence at the time the Governor makes such a determination.

VI. Sentencing Commission

Senate Bill No. 451 (2017) which became effective on July 1, 2017, creates the Nevada Sentencing Commission. The legislation establishes a new 25 member Commission, with members from all three branches of state government, representatives of local governments (law enforcement and prosecutors) and members of the public representing victims and offenders. The bill arose out of a unanimous recommendation from the bipartisan Nevada Advisory Commission on the Administration of Justice, chaired by Justice James Hardesty of the Nevada Supreme Court. Specifically, the bill opens by declaring the public policy of the State of Nevada regarding sentencing, which includes, among other policies, the statement that “[s]entencing and corrections policies should embody fairness, consistency, proportionality and opportunity.” The policies were modeled after the seven principles of effective state sentencing and corrections policy outlined in the 2011 Report of the National Conference of State Legislatures Sentencing and Corrections Work Group.¹⁹

The bill further prescribes the duties of the Sentencing Commission, and includes, among other duties related to the sentencing of offenders, a duty to make recommendations concerning the adoption of sentencing guidelines. The Commission will meet over the course of the interim periods between legislative sessions and is charged with making findings and recommendations to the Legislature regarding all matters relating to sentencing for felonies and gross misdemeanors. Additionally, the Commission may submit one bill draft request relating to their findings for each session of the Nevada Legislature.

VII. State Board of Pardons Commissioners

Senate Joint Resolution No. 1 (2017) which was adopted during the 2017 Legislative Session, proposes a constitutional amendment addressing the State Board of Pardons Commissioners. The Nevada Constitution establishes the authority, powers and duties of the Board, which is composed of the Governor, the justices of the Supreme Court and the Attorney General, but does not explicitly provide for the Board.²⁰ This resolution proposes to amend the Nevada Constitution to: (1) expressly provide for the State Board of Pardons Commissioners; (2) eliminate the requirement that the Governor vote in the majority for any action; (3) require the State Board of Pardons Commissioners to meet at least quarterly; (4) authorize any member of the State Board of Pardons Commissioners to submit matters for consideration by the Board; and (5) provide that a majority of the members of the State Board of Pardons Commissioners is sufficient for any action taken by the Board. As a constitutional amendment, the resolution must be returned to the 2019 Nevada Legislature, be passed in identical form and then be approved by the voters at the next general election.

VIII. Conclusion

While at times, some of the measures referenced herein became partisan in nature, as some would say the legislation was “soft on crime,” and others would argue that the legislation “did not go far enough,” the goal of this paper is simply to highlight Nevada’s approach to criminal justice reforms that passed and became law during the 2017 Session of the Nevada Legislature. It is also worth mentioning that a number of other significant measures relating to criminal justice reform were debated and discussed throughout the Legislative Session. As part of the legislative process, some of the measures either did not pass both houses of the Legislature or were vetoed by the Governor. Such topics included: establishing bail reform, revising and making various changes to sex offender laws, vacating of certain judgments of conviction and sealing of certain records relating to marijuana, authorizing a court to depart from prescribed minimum terms of imprisonment for the possession of controlled substances, revising provisions governing the filing of a complaint after an arrest without a warrant, abolishing capital punishment, revising provisions relating to eligibility of certain convicted persons for public assistance and authorizing the residential confinement or other appropriate supervision of certain older offenders.

While the various reforms enacted by the Legislature in 2017 may take time to implement and to fully realize the direct impact and effect on the citizens of Nevada, the legislation ultimately strived to reform Nevada’s criminal justice system and to make Nevada laws relating to the collateral consequences of criminal convictions less burdensome and complex.

Notes

*The views expressed in this article are not necessarily the views of the Nevada Legislative Counsel Bureau. The Bureau serves as independent non-partisan staff to both houses of the Nevada Legislature and is prohibited from opposing or advocating for the passage of any legislation.

¹ Assembly Bill Nos. 25, 181, 243, 327 and 384 (2017); Senate Bill Nos. 125 and 451 (2017); and Senate Joint Resolution No. 1 (2017). Full text of the measures is available at <https://www.leg.state.nv.us>.

² Minutes of the Senate Committee on Judiciary, March 7, 2017, at 6.

³ Brennan Center For Justice, *Voting Rights Restoration Efforts in Nevada*, June 2017.

⁴ NRS 176A.850.

⁵ NRS 176A.870 (repealed by AB 181).

⁶ Minutes of the Assembly Committee on Corrections, Parole and Probation, March 7, 2017, at 6.

⁷ NRS 176A.850, 213.090, 213.155 and 213.157.

⁸ NRS 179.245 and 179.255.

⁹ *Id.*

¹⁰ Minutes of the Senate Committee on Judiciary, May 30, 2017, at 5.

¹¹ *Id.*

¹² Subsection 5 of NRS 179.245.

¹³ Minutes, *supra* note 10, at 6.

¹⁴ *Id.*

¹⁵ NRS 179.285.

¹⁶ NRS 179.301.

¹⁷ Minutes of the Assembly Committee on Government Affairs, April 10, 2017.

¹⁸ Beth Avery and Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide>.

¹⁹ Alison Lawrence and Donna Lyons, *Principles of Effective State Sentencing and Corrections Policy*, <http://www.ncsl.org/research/civil-and-criminal-justice/principles-of-effective-state-sentencing-and-c42.aspx>.

²⁰ Nev. Const. Art. 5 § 14.