

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 260

Introduced by Rogert, 16; McGill, 26.

Read first time January 14, 2009

Committee: Judiciary

A BILL

- 1 FOR AN ACT relating to civil actions; to adopt the Nebraska Claims
- 2 for Wrongful Conviction and Imprisonment Act.
- 3 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 12 of this act shall be known
2 and may be cited as the Nebraska Claims for Wrongful Conviction and
3 Imprisonment Act.

4 Sec. 2. The Legislature finds that innocent persons who
5 have been wrongly convicted of crimes and subsequently imprisoned
6 have been uniquely victimized, have distinct problems reentering
7 society, and have difficulty achieving legal redress due to a
8 variety of substantive and technical obstacles in the law. The
9 Legislature also finds that such persons should have an available
10 avenue of redress. In light of the particular and substantial
11 horror of being imprisoned for a crime one did not commit,
12 the Legislature intends by enactment of the Nebraska Claims for
13 Wrongful Conviction and Imprisonment Act that persons who can
14 demonstrate that they were wrongfully convicted shall immediately
15 receive services upon release as provided in section 6 of this
16 act and persons who can meet the higher standard of proving their
17 actual innocence shall be able to receive monetary compensation.

18 Sec. 3. (1) In order to present an actionable claim for
19 wrongful conviction and imprisonment, a claimant must verify the
20 claim and establish by documentary evidence that:

21 (a) He or she has been convicted of one or more crimes
22 and subsequently sentenced to a term of imprisonment for such crime
23 or crimes and has served all or any part of the sentence;

24 (b) On grounds not inconsistent with innocence:

25 (i) He or she was pardoned for the crime or crimes for

1 which he or she was sentenced on grounds which are the basis for
2 the complaint;

3 (ii) The statute, or application thereof, on which the
4 information or indictment was based, violated the United States
5 Constitution or the Constitution of Nebraska;

6 (iii) The judgment of conviction was vacated; or

7 (iv) The judgment of conviction was reversed;

8 (c) If there was a vacatur or reversal, either the
9 information or indictment was dismissed or, if a new trial was
10 held, the defendant was found not guilty; and

11 (d) His or her claim is not time-barred by section 9 of
12 this act.

13 (2) If the court finds after reading the claim that the
14 claimant has not alleged sufficient facts to succeed at trial, it
15 shall dismiss the claim, either on its own motion or on the state's
16 motion.

17 Sec. 4. All claims of wrongful conviction and
18 imprisonment shall be presented to and heard by the district court
19 in the county where the claimant was convicted.

20 Sec. 5. To obtain a judgment in his or her favor, a
21 claimant must prove by a preponderance of the evidence:

22 (1) The elements required under section 3 of this act;

23 (2) That he or she did not commit any of the crimes
24 charged in the information or indictment or the acts or omissions
25 charged in the information or indictment did not constitute a

1 crime; and

2 (3) That he or she did not commit or suborn perjury or
3 fabricate evidence to cause or bring about his or her conviction.
4 However, neither a confession or admission later found to be
5 false, nor a guilty plea to a crime the claimant did not commit,
6 constitutes bringing about his or her own conviction under the
7 Nebraska Claims for Wrongful Conviction and Imprisonment Act.

8 Sec. 6. If the court finds that the claimant was
9 wrongfully convicted and incarcerated pursuant to subsection (1) of
10 section 3 of this act, the court shall award:

11 (1) Damages for the physical injury of wrongful
12 conviction and incarceration which shall be not less than fifty
13 thousand dollars for each year of incarceration, with an additional
14 fifty thousand dollars for each year served on death row. This
15 amount shall reflect:

16 (a) An adjustment for inflation from the date of
17 enactment by the method provided in section 151 of the Internal
18 Revenue Code of 1986, as amended, and partial years the claimant
19 served; and

20 (b) Consideration of:

21 (i) Economic damages, including, but not limited to:

22 (A) Lost wages;

23 (B) Costs associated with his or her criminal defense and
24 efforts to prove innocence; and

25 (C) Medical and dental expenses incurred or expected to

1 be incurred after release;

2 (ii) Noneconomic damages for:

3 (A) Personal physical injuries or physical sickness; and

4 (B) Any nonphysical injuries or sickness incurred during
5 or as a result of incarceration;

6 (2) Up to five years of physical and mental health care
7 through the state employees group health insurance program, to
8 be offset by any amount provided through the claimant's employer
9 during that time period;

10 (3) Reimbursement for any tuition and fees paid for
11 the education of the claimant at any community college in this
12 state, any state college in this state, or the University of
13 Nebraska, including any necessary assistance to meet the criteria
14 required therefor, or a mutually agreed upon vocational program,
15 and employment skills development training;

16 (4) Compensation for child support payments owed by the
17 claimant that became due and interest on child support arrearages
18 that accrued during the time served in prison but were not paid;

19 (5) Compensation for any reasonable costs incurred by
20 the claimant for immediate services secured upon exoneration
21 and release, including housing, transportation and subsistence,
22 reintegrative services, and mental and physical health care costs
23 incurred by the claimant for the time period between his or her
24 release from wrongful incarceration and the date of his or her
25 award; and

1 (6) Reasonable attorney's fees for bringing a claim under
2 the Nebraska Claims for Wrongful Conviction and Incarceration Act,
3 calculated at ten percent of the damage award plus expenses.
4 Reasonable attorney's fees, exclusive of expenses, shall not exceed
5 seventy-five thousand dollars, as adjusted for inflation from the
6 effective date of this act by the method provided in section 151
7 of the Internal Revenue Code of 1986, as amended. Such fees shall
8 not be deducted from the compensation due the claimant, and the
9 claimant's counsel is not entitled to receive additional fees from
10 the claimant.

11 Sec. 7. (1) The damage award under section 6 of this act
12 shall not be subject to:

13 (a) Any limit applicable to private parties in civil
14 lawsuits;

15 (b) Any state taxes, except for those portions of the
16 judgment awarded as attorney's fees for bringing a claim under the
17 Nebraska Claims for Wrongful Conviction and Imprisonment Act; or

18 (c) Treatment as gross income to a claimant under the
19 Nebraska Revenue Act of 1967.

20 (2) The acceptance by a claimant of any award,
21 compromise, or settlement shall:

22 (a) Be reduced to writing; and

23 (b) Except when procured by fraud, be final and
24 conclusive on the claimant.

25 (3) Any future damages awarded to the claimant resulting

1 from an action by the claimant against the state or any political
2 subdivision by reason of the wrongful conviction and imprisonment
3 shall be offset by the damage award received under the act.

4 (4) The damage award shall not be offset by any expenses
5 incurred by the state or any political subdivision, including, but
6 not limited to:

7 (a) Expenses incurred:

8 (i) To secure the claimant's custody; or

9 (ii) To feed, clothe, or provide medical services for the
10 claimant; or

11 (b) The value of any services or reduction in fees for
12 service, or the value thereof, to be provided to the claimant that
13 may be awarded to the claimant pursuant to the act.

14 (5) If the court finds that any property of the claimant
15 was subjected to a lien pursuant to defense services rendered by
16 the state to defend the client in connection with the criminal case
17 that resulted in his or her wrongful conviction, the court shall
18 extinguish the lien.

19 Sec. 8. (1) A court finding an actionable claim under
20 section 3 of this act shall provide a copy of the Nebraska Claims
21 for Wrongful Conviction and Imprisonment Act to the claimant when
22 the claim is not dismissed under section 3 of this act.

23 (2) The claimant shall acknowledge, in writing, his or
24 her receipt of a copy of the act on a form established by the
25 Supreme Court.

1 (3) The Supreme Court shall enter the acknowledgment on
2 the docket, and the acknowledgment shall be admissible in any
3 proceeding filed by a claimant under the act.

4 (4) The Board of Pardons, upon the issuance of a full
5 pardon on or after the effective date of this act, shall provide a
6 copy of the act at the time the pardon is issued to the individual
7 pardoned. The individual shall acknowledge, in writing, his or
8 her receipt of a copy of the act on a form established by the
9 board, which acknowledgement shall be retained on file by the board
10 as part of its official records and shall be admissible in any
11 proceeding filed by a claimant under the act.

12 (5) In the event a claimant granted judicial relief or
13 a full pardon on or after the effective date of this act shows
14 he or she did not receive a copy of the information required by
15 this section, he or she shall receive a one-year extension on the
16 three-year statute of limitations provided in section 9 of this
17 act.

18 (6) The State Court Administrator shall make reasonable
19 attempts to notify all persons pardoned prior to the effective
20 date of this act or granted judicial relief, consistent with the
21 criteria set forth in section 3 of this act, of their rights under
22 the act.

23 Sec. 9. (1) An action for compensation brought under
24 the Nebraska Claims for Wrongful Conviction and Imprisonment Act
25 shall be commenced within two years after either the grant of a

1 pardon or the grant of judicial relief and satisfaction of other
2 conditions described in section 3 of the act. Any action by the
3 state challenging or appealing the grant of such judicial relief
4 shall toll the two-year period. Persons convicted, incarcerated,
5 and released from custody prior to the effective date of this act
6 shall commence an action under the act within three years after the
7 effective date of this act.

8 (2) Notwithstanding any other provision of law, failure
9 to file any applicable notice of claim shall not bar filing of a
10 claim under the act.

11 Sec. 10. Either party to an action for compensation
12 brought under the Nebraska Claims for Wrongful Conviction and
13 Imprisonment Act is entitled to the rights of appeal afforded
14 parties in a civil action.

15 Sec. 11. (1) Any person convicted and subsequently
16 imprisoned for one or more crimes who is pardoned on grounds
17 not inconsistent with innocence or whose conviction is reversed
18 or vacated on the basis of newly discovered evidence, and either
19 the charges are dismissed or he or she is subsequently retried
20 and acquitted, shall receive up to two years of immediate
21 services needed upon release, including, but not limited to:
22 Housing; secondary or postsecondary education; vocational training;
23 transportation; subsistence monetary assistance; reintegrative
24 services; and mental, physical, and dental health care. The need
25 for these services shall be determined through a review by the

1 Department of Health and Human Services and provided by the
2 appropriate state entities or political subdivisions.

3 (2) When a conviction is vacated, a judge may order that
4 services similar to those in this section be provided.

5 Sec. 12. (1) Upon obtaining a postconviction exoneration
6 for actual innocence through either a pardon based on innocence
7 from an erroneous felony conviction or a judicial order vacating or
8 reversing an erroneous felony conviction, a person may petition
9 the district court in which the erroneous felony conviction
10 occurred for an order to seal or expunge all records, data,
11 and forensic samples pertaining to the erroneous felony conviction.
12 The petition shall be accompanied by a certified copy of the
13 pardon or judicial order vacating or reversing the erroneous felony
14 conviction. The petitioner shall serve a copy of the petition on
15 the county attorney of the county in which the erroneous felony
16 conviction occurred. The county attorney shall file an answer and
17 an inventory identifying all criminal records, data, and forensic
18 samples pertaining to the erroneous felony conviction that are in
19 the custody or control of any law enforcement agency. If the county
20 attorney files no objection to the petition, the court may grant
21 the petition.

22 (2) If the county attorney files an objection to the
23 petitioner's request for sealing or expunging the criminal records,
24 data, and forensic samples pertaining to the erroneous felony
25 conviction, the court shall conduct a hearing on the matter. In

1 determining whether the petition is warranted and, if so, whether
2 sealing or expunction is the appropriate remedy, the court shall
3 consider the interests of privacy and justice pertaining to the
4 petitioner's erroneous felony conviction, as well as the likely
5 effect of such sealing or expunction on law enforcement agencies
6 and their ability to effectively investigate and prosecute other
7 persons for the felony or felonies which relate to information
8 contained in the records, data, and forensic samples.

9 (3) If a court determines that the petition is warranted
10 and orders the sealing and expunction of all records, data, and
11 forensic samples pertaining to the petitioner's erroneous felony
12 conviction, a law enforcement agency may gain access to such
13 person's sealed or expunged records, data, and forensic samples
14 only with a court order upon good cause showing that access to the
15 sealed or expunged records, data, and forensic samples is required
16 for the performance of official law enforcement duties.

17 (4) If a court determines that the petition is warranted
18 and orders the sealing or expunction of all records, data, and
19 forensic samples pertaining to the petitioner's erroneous felony
20 conviction, the court shall notify the Nebraska State Patrol
21 and any other law enforcement agency to seal or expunge all
22 records, data, and forensic samples, including all DNA records and
23 profiles, relating to the petitioner's erroneous felony conviction
24 and destroy all DNA samples from the petitioner in its possession.

25 (5) The Nebraska State Patrol, any other law enforcement

1 agency involved, and the court shall provide written notice of the
2 sealing or expunction by certified mail to the petitioner and any
3 other person or entity to whom or which such records, data, and
4 forensic samples have been made available.

5 (6) A person who obtains a court order to seal or expunge
6 the records, data, and forensic samples pertaining to such person's
7 erroneous felony conviction may lawfully answer and swear under
8 oath that an arrest, prosecution, or conviction pertaining to the
9 erroneous conviction never occurred.

10 (7) Any party may appeal a final order granting or
11 denying the sealing or expunction of records, data, or forensic
12 samples pertaining to the erroneous felony conviction.