

LEGISLATURE OF NEBRASKA  
ONE HUNDRED SIXTH LEGISLATURE  
SECOND SESSION

**LEGISLATIVE BILL 1181**

Introduced by Wayne, 13.

Read first time January 23, 2020

Committee: Judiciary

1 A BILL FOR AN ACT relating to crimes and offenses; to amend section  
2 29-2221, Reissue Revised Statutes of Nebraska, and sections 28-101  
3 and 28-105, Revised Statutes Supplement, 2019; to adopt the Fair  
4 Sentencing Act; to allow courts to impose sentences without  
5 mandatory minimums for certain controlled substance offenses; to  
6 prohibit holding a defendant in custody awaiting trial beyond a  
7 prescribed period; to define terms; to exclude certain nonviolent  
8 felonies from the habitual criminal enhancement; to harmonize  
9 provisions; and to repeal the original sections.  
10 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 28-101, Revised Statutes Supplement, 2019, is  
2 amended to read:

3 28-101 Sections 28-101 to 28-1357 and 28-1601 to 28-1603 and  
4 sections 3 and 4 of this act shall be known and may be cited as the  
5 Nebraska Criminal Code.

6 Sec. 2. Section 28-105, Revised Statutes Supplement, 2019, is  
7 amended to read:

8 28-105 (1) For purposes of the Nebraska Criminal Code and any  
9 statute passed by the Legislature after the date of passage of the code,  
10 felonies are divided into ten classes which are distinguished from one  
11 another by the following penalties which are authorized upon conviction:

- |    |                  |  |
|----|------------------|--|
| 12 | Class I felony   | Death  |
| 13 | Class IA felony  | Life imprisonment                                    |
| 14 | Class IB felony  | Maximum-life imprisonment                            |
| 15 |                  | Minimum-twenty years imprisonment                    |
| 16 | Class IC felony  | Maximum-fifty years imprisonment                     |
| 17 |                  | Mandatory minimum-five years imprisonment            |
| 18 |                  | <u>(except as provided in section 3 of this act)</u> |
| 19 | Class ID felony  | Maximum-fifty years imprisonment                     |
| 20 |                  | Mandatory minimum-three years imprisonment           |
| 21 |                  | <u>(except as provided in section 3 of this act)</u> |
| 22 | Class II felony  | Maximum-fifty years imprisonment                     |
| 23 |                  | Minimum-one year imprisonment                        |
| 24 | Class IIA felony | Maximum-twenty years imprisonment                    |
| 25 |                  | Minimum-none   |
| 26 | Class III felony | Maximum-four years imprisonment and two years        |
| 27 |                  | post-release supervision or                          |
| 28 |                  | twenty-five thousand dollars fine, or both           |
| 29 |                  | Minimum-none for imprisonment and nine months        |
| 30 |                  | post-release supervision if imprisonment is imposed  |

1 Class IIIA felony Maximum—three years imprisonment  
2 and eighteen months post-release supervision or  
3 ten thousand dollars fine, or both  
4 Minimum—none for imprisonment and nine months  
5 post-release supervision if imprisonment is imposed  
6 Class IV felony Maximum—two years imprisonment and twelve  
7 months post-release supervision or  
8 ten thousand dollars fine, or both  
9 Minimum—none for imprisonment and none for  
10 post-release supervision

11 (2) All sentences for maximum terms of imprisonment for one year or  
12 more for felonies shall be served in institutions under the jurisdiction  
13 of the Department of Correctional Services. All sentences for maximum  
14 terms of imprisonment of less than one year shall be served in the county  
15 jail.

16 (3) Nothing in this section shall limit the authority granted in  
17 sections 29-2221 and 29-2222 to increase sentences for habitual  
18 criminals.

19 (4) A person convicted of a felony for which a mandatory minimum  
20 sentence is prescribed shall not be eligible for probation.

21 (5) All sentences of post-release supervision shall be served under  
22 the jurisdiction of the Office of Probation Administration and shall be  
23 subject to conditions imposed pursuant to section 29-2262 and subject to  
24 sanctions authorized pursuant to section 29-2266.02.

25 (6) Any person who is sentenced to imprisonment for a Class I, IA,  
26 IB, IC, ID, II, or IIA felony and sentenced concurrently or consecutively  
27 to imprisonment for a Class III, IIIA, or IV felony shall not be subject  
28 to post-release supervision pursuant to subsection (1) of this section.

29 (7) Any person who is sentenced to imprisonment for a Class III,  
30 IIIA, or IV felony committed prior to August 30, 2015, and sentenced  
31 concurrently or consecutively to imprisonment for a Class III, IIIA, or

1 IV felony committed on or after August 30, 2015, shall not be subject to  
2 post-release supervision pursuant to subsection (1) of this section.

3 (8) The changes made to the penalties for Class III, IIIA, and IV  
4 felonies by Laws 2015, LB605, do not apply to any offense committed prior  
5 to August 30, 2015, as provided in section 28-116.

6 Sec. 3. (1) This section applies to a sentence for a violation of  
7 section 28-416 or a violation of section 28-202 with a violation of  
8 section 28-416 as the underlying offense which is classified as a felony  
9 for which a mandatory minimum sentence is authorized by section 28-105.

10 (2) If the court, upon review of a presentence investigation report  
11 and consideration of the factors set forth in section 29-2260, finds that  
12 the imposition of a mandatory minimum sentence as prescribed for a  
13 violation described in subsection (1) of this section would result in a  
14 sentence which would not serve the public interest, then the court may  
15 impose a sentence for which the otherwise applicable mandatory minimum  
16 term is a minimum term only. The court shall set forth its determination  
17 under this section in writing, with specific findings of fact and the  
18 reasons for its determination.

19 Sec. 4. A defendant charged with any offense shall not be held in  
20 custody awaiting trial on such offense for a period of time longer than  
21 the maximum possible sentence of imprisonment authorized for such  
22 offense. On the next judicial day after expiration of such deadline, the  
23 defendant shall be released on such defendant's personal recognizance.

24 Sec. 5. Section 29-2221, Reissue Revised Statutes of Nebraska, is  
25 amended to read:

26 29-2221 (1) Except as provided in subsection (2) of this section,  
27 whoever ~~whoever~~ has been twice convicted of a crime, sentenced, and  
28 committed to prison, in this or any other state or by the United States  
29 or once in this state and once at least in any other state or by the  
30 United States, for terms of not less than one year each shall, upon  
31 conviction of a felony committed in this state, be deemed to be a

1 habitual criminal and shall be punished by imprisonment in a Department  
2 of Correctional Services adult correctional facility for a mandatory  
3 minimum term of ten years and a maximum term of not more than sixty  
4 years, except that:

5 (a) If the felony committed is in violation of section 28-303,  
6 28-304, 28-308, 28-313, 28-319, 28-319.01, 28-502, 28-929, or 28-1222,  
7 and at least one of the habitual criminal's prior felony convictions was  
8 for a violation of one of the sections listed in this subdivision or of a  
9 similar statute in another state or of the United States, the mandatory  
10 minimum term shall be twenty-five years and the maximum term not more  
11 than sixty years;

12 (b) If the felony committed is in violation of subsection (3) of  
13 section 28-306 and at least one of the prior convictions is in violation  
14 of subsection (3) of section 28-306 and the other is in violation of one  
15 of the sections set forth in subdivision (a) of this subsection or if the  
16 felony committed is in violation of one of the sections set forth in  
17 subdivision (a) of this subsection and both of the prior convictions are  
18 in violation of subsection (3) of section 28-306, the mandatory minimum  
19 term shall be twenty-five years and the maximum term not more than sixty  
20 years; and

21 (c) If a greater punishment is otherwise provided by statute, the  
22 law creating the greater punishment shall govern.

23 (2)(a) A conviction for a nonviolent felony:

24 (i) Shall not receive an enhanced penalty under this section; and

25 (ii) Shall not be considered in determining whether a person is a  
26 habitual criminal.

27 (b) For purposes of this section:

28 (i)(A) Nonviolent felony means a felony that does not have, as an  
29 element of the offense:

30 (I) Sexual contact or sexual penetration; or

31 (II) The threat to inflict serious bodily injury or death on another

1 person, the infliction of serious bodily injury on another person, or  
2 causing the death of another person; and

3 (B) Nonviolent felony does not include a violation of section  
4 28-313, 28-314, 28-502, 28-831, or 28-1222 or attempt of, conspiracy to  
5 commit, solicitation of, being an accessory to, aiding and abetting,  
6 aiding the consummation of, or compounding a felony when the underlying  
7 offense is a violation of section 28-313, 28-314, 28-502, 28-831, or  
8 28-1222 or any of the offenses in subdivision (2)(b)(i)(A) of this  
9 section.

10 (ii) Sexual contact and sexual penetration have the same meaning as  
11 in section 28-318; and

12 (iii) Serious bodily injury has the same meaning as in section  
13 28-109.

14 (3) (2) When punishment of an accused as a habitual criminal is  
15 sought, the facts with reference thereto shall be charged in the  
16 indictment or information which contains the charge of the felony upon  
17 which the accused is prosecuted, but the fact that the accused is charged  
18 with being a habitual criminal shall not be an issue upon the trial of  
19 the felony charge and shall not in any manner be disclosed to the jury.  
20 If the accused is convicted of a felony, before sentence is imposed a  
21 hearing shall be had before the court alone as to whether such person has  
22 been previously convicted of prior felonies. The court shall fix a time  
23 for the hearing and notice thereof shall be given to the accused at least  
24 three days prior thereto. At the hearing, if the court finds from the  
25 evidence submitted that the accused has been convicted two or more times  
26 of felonies and sentences imposed therefor by the courts of this or any  
27 other state or by the United States, except as provided in subsection (2)  
28 of this section, the court shall sentence such person so convicted as a  
29 habitual criminal.

30 (4) (3) If the person so convicted shows to the satisfaction of the  
31 court before which the conviction was had that he or she was released

1 from imprisonment upon either of such sentences upon a pardon granted for  
2 the reason that he or she was innocent, such conviction and sentence  
3 shall not be considered as such under this section and section 29-2222.

4 Sec. 6. Sections 6 to 11 of this act shall be known and may be  
5 cited as the Fair Sentencing Act.

6 Sec. 7. (1) In response to a legislative change eliminating or  
7 reducing the punishment for an offense, a prisoner in custody under  
8 sentence of imprisonment for such an offense may file a verified motion,  
9 in the court which imposed such sentence, asking the court to resentence  
10 the prisoner in accordance with the new law.

11 (2) This section applies to any legislative change that would reduce  
12 the penalty for an offense that a prisoner was convicted of, including,  
13 but not limited to:

14 (a) A reduction in the sentence authorized for the offense;

15 (b) The repeal or decriminalization of the offense; or

16 (c) A change to the elements of an offense such that the offense the  
17 prisoner was convicted of would no longer be a crime or would carry a  
18 lesser punishment. In making a determination under this subdivision, the  
19 court shall examine only the elements of the offense of conviction as  
20 charged, and not the underlying factual basis for the conviction, unless  
21 the parties have stipulated to such factual basis.

22 (3)(a) The court shall first determine whether, due to a legislative  
23 change, the punishment for the prisoner's offense has been eliminated or  
24 lessened. Unless the motion and the files and records of the case show to  
25 the satisfaction of the court that no such elimination or lessening of  
26 the punishment for the prisoner's offense has occurred, the court shall  
27 cause notice of the motion to be served on the county attorney, grant a  
28 prompt hearing on the motion, make the determination required by this  
29 subsection, and set forth the reasons for its findings.

30 (b) The court may make the determination required by this subsection  
31 without requiring the production of the prisoner, whether or not a

1 hearing is held.

2 (4)(a) If the court finds that, due to a legislative change, the  
3 punishment for the prisoner's offense has been eliminated or lessened,  
4 the court shall set the matter for hearing to determine whether to  
5 resentence the prisoner and, if so, the prisoner's new sentence. The  
6 prisoner shall be present at the hearing unless waived by the prisoner.  
7 The resentencing shall be done in accordance with the rules generally  
8 governing sentencing, except that the court may, but is not required to,  
9 order a new presentence investigation report.

10 (b) The court may resentence the defendant to any sentence  
11 authorized by the law at the time of such resentencing that is less than  
12 the sentence originally imposed. This includes terms and types of  
13 sentences not authorized when the prisoner was originally sentenced or  
14 different from the prisoner's original sentence, such as post-release  
15 supervision and probation.

16 (c) In determining whether to resentence the prisoner and, if so,  
17 the prisoner's new sentence, the court shall consider the factors set  
18 forth in section 29-2260, the prisoner's conduct while imprisoned, the  
19 extent of the prisoner's rehabilitation, and whether the prisoner's age  
20 or condition weigh in favor of release or a lesser sentence.

21 Sec. 8. The court may appoint not to exceed two attorneys to  
22 represent a prisoner in all proceedings under the Fair Sentencing Act.  
23 The court, upon hearing the application, shall fix reasonable expenses  
24 and fees, and the county board shall allow payment to the attorney or  
25 attorneys in the full amount determined by the court. The attorney or  
26 attorneys shall be competent and shall provide effective counsel.

27 Sec. 9. An order granting or denying a motion under section 7 of  
28 this act is a final, appealable order for purposes of section 25-1902.

29 Sec. 10. The court need not entertain a second motion or successive  
30 motions for similar relief under section 7 of this act on behalf of the  
31 same prisoner. Similar relief does not include additional motions based



1 on additional legislative changes.

2       Sec. 11. The Fair Sentencing Act applies to offenses committed  
3 before, on, or after the effective date of this act.

4       Sec. 12. Original section 29-2221, Reissue Revised Statutes of  
5 Nebraska, and sections 28-101 and 28-105, Revised Statutes Supplement,  
6 2019, are repealed.