

SESSION OF 2018

**SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2579**

As Amended by Senate Committee on Judiciary

**Brief\***

HB 2579, as amended, would create a civil cause of action allowing claimants to seek damages from the State for wrongful conviction.

***Establishing Eligibility for Damages***

A claimant would be entitled to damages if he or she establishes by a preponderance of evidence:

- The claimant was convicted of a felony crime and subsequently imprisoned;
- The claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty;
- The claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges, or finding of not guilty on retrial; and
- The claimant did not commit or suborn perjury, fabricate evidence, or by the claimant's own conduct cause or bring about the conviction.

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

For these purposes, neither a confession nor admission later found to be false or a guilty plea would constitute committing or suborning perjury, fabricating evidence, or causing or bringing about the conviction. Additionally, the bill would allow the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, in the interest of justice, to give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence, or other factors not caused by such person or those acting on their behalf.

The bill would require the suit, accompanied by a statement of the facts concerning the claim for damages and verified by the claimant, to be brought by the claimant within a period of two years after the dismissal of the criminal charges against the claimant, finding of not guilty on retrial, or grant of a pardon to the claimant. A claimant convicted, imprisoned, and released from custody before July 1, 2018, would be required to commence an action under this section no later than July 1, 2020.

The bill would specify the caption form for pleadings and require any claim filed under the bill be served on the Attorney General in accordance with the Code of Civil Procedure. The claim would be tried by the court and no request for jury trial would be permitted. The decision of the district court could be appealed directly to the Supreme Court pursuant to the Code of Civil Procedure.

### ***Monetary Damages***

A claimant entitled to damages would receive \$50,000 for each year of imprisonment, as well as not less than \$25,000 for each additional year served on parole or postrelease supervision or each additional year the claimant was required to register as an offender under the Kansas Offender Registration Act, whichever is greater. A claimant would not receive compensation for any period of

incarceration during which the claimant was concurrently serving a sentence for a conviction of another crime for which such claimant was lawfully incarcerated. The bill would require the court to order the award be paid as a combination of an initial payment not to exceed \$100,000 and the remainder as an annuity not to exceed \$80,000 per year. The bill would allow the claimant to designate a beneficiary or beneficiaries for the annuity by filing such designation with the court. Alternatively, the bill would allow the court to order one lump sum payment if it finds it is in the best interests of the claimant.

If, at the time the judgment for the award is entered, the claimant has won a monetary award against or has entered into a settlement with the State or any political subdivision thereof in a civil action related to the same subject, the amount of the award in the action or received in the settlement agreement, minus any sums paid to attorneys or for costs in litigating the other civil action or obtaining the settlement agreement, would be deducted from the sum of money to which the claimant is entitled pursuant to the bill. The court would include in the judgment entry an award to the State of any amount deducted.

If, after the judgment is entered, the claimant wins a monetary award against or enters into a settlement with the State or any political subdivision thereof in a civil action related to the same subject, the claimant would be required to reimburse the State for the sum of money paid pursuant to the claim under the bill, minus any sums paid to attorneys or for costs in litigating the other civil action or obtaining the settlement agreement. The amount of the reimbursement would not exceed the amount of the monetary award the claimant wins for damages in the other civil action or receives in the settlement agreement.

### ***Fees, Costs, and Other Relief***

In addition to monetary damages, the bill allows the court to award other non-monetary relief as sought in the complaint, including, but not limited to counseling, housing assistance, and personal financial literacy assistance as appropriate. Further, the bill states claimants would be entitled to receive reasonable attorney fees and costs incurred in the action brought pursuant to the bill; receive tuition assistance; and participate in the state health care benefits program (Program).

#### ***Tuition Assistance***

Claimants awarded tuition assistance would receive a waiver of tuition and required fees for attendance at a “postsecondary educational institution” (defined in the bill) for up to 130 credit hours and could attend either full time or part time. The Kansas Board of Regents (KBOR) would be authorized to make expenditures to reimburse each individual awarded tuition assistance for additional fees, including but not limited to fees for room and board, technical equipment, and course-required books. Further, the bill would prohibit delayed enrollment of an individual who is awarded tuition assistance because appropriations are not available for any additional fees provided to such individual. To remain eligible for tuition and fees waiver, the individual would be required to remain in good standing at the institution where the individual is enrolled and provide a written electronic copy of the court order awarding relief in the form of tuition assistance to the institution or KBOR. KBOR would be required to adopt rules and regulations to administer this tuition assistance.

#### ***State Health Care Benefits***

On and after July 1, 2018, a claimant would have 31 calendar days from the date of judgment entered to complete or decline enrollment in the Program for the remainder of the plan year and for the next ensuing plan year. A claimant

would be qualified to participate in the Program for the remainder of the claim year and the next ensuing plan year. A claimant would not be qualified to elect a high-deductible health plan and health savings account under the Program. The cost of premiums would be paid from the Tort Claims Fund and would not be charged to the claimant. The claimant would pay any applicable copayments, deductibles, and other related costs, however, and could elect to include the claimant's dependents, in which case the claimant would be responsible for costs of premiums, copayments, deductibles, and other costs for covered dependents. The Attorney General would be required to provide assistance to obtain and maintain coverage including enrollment, maintenance of records, and other assistance.

#### ***Certificate of Innocence; Expungement Orders***

If the court finds the claimant is entitled to a judgment, the bill would require the court to enter a certificate of innocence finding the claimant was innocent of all crimes for which the claimant was mistakenly convicted and order the associated convictions and arrest records expunged and purged from all applicable state and federal systems. The court would be required to enter the expungement order regardless of whether the claimant has prior criminal convictions. The bill would outline the required contents of the order of expungement, which would include a direction to the Kansas Bureau of Investigation (KBI) to purge the conviction and arrest information from the criminal justice information system central repository and all applicable state and federal databases. The clerk of the court would send a certified copy of the order to the KBI, which would then be required to carry out the order and notify the Federal Bureau of Investigation, the Secretary of Corrections, and any other criminal justice agency that may have a record of the conviction and arrest. The KBI would be required to provide confirmation of such action to the court. If a certificate of innocence and an order of expungement are entered, the bill states the claimant would be treated as not having been arrested or convicted of the crime.

Upon entry of a certificate of innocence, the bill would also require the court to order the expungement and destruction of the associated biological samples authorized by and given to the KBI in accordance with state law requiring collection of such samples in certain circumstances. The order would direct the KBI to expunge and destroy such samples and profile record. The clerk of the court would send a certified copy of the order to the KBI, which would be required to carry out the order and provide confirmation of such action to the court. The bill would state the KBI would not be required to expunge and destroy any samples or profile record associated with the claimant related to any offense other than the offense for which the court has entered a certificate of innocence.

The bill states the decision to grant or deny a certificate of innocence would not have a *res judicata* effect on any other proceedings.

#### ***Kansas Department of Corrections Reentry Services***

The bill would state nothing in the bill would preclude the Kansas Department of Corrections (KDOC) from providing reentry services to a claimant that are provided to other persons, including, but not limited to, financial assistance, housing assistance, mentoring, and counseling. Such services would be provided while an action under this section is pending and after any judgment is entered, as appropriate for such claimant.

#### ***Additional Responsibilities of the Attorney General***

When a judgment is entered, the Attorney General would be required to seek damages for the State of Kansas for the benefit of the State General Fund (SGF) from any persons who knowingly contributed to the wrongful conviction and imprisonment of the claimant to the extent the evidence in the case warrants such action. The Attorney General would also be required to prosecute ouster and criminal proceedings as the evidence in the case warrants.

Upon receiving a certified copy of the certificate of innocence and the judgment entry from the clerk of the court, the Attorney General would be required to pay any judgment through the procedure established in the Tort Claims Act.

The bill would amend the statute governing the Tort Claims Fund administered by the Attorney General to provide moneys in that fund could be used to pay judgments arising under the bill.

## **Background**

The bill was introduced by the House Committee on Judiciary at the request of the Innocence Project. In the House Committee hearing, three exonerated individuals, as well as representatives of the Innocence Project, the Midwest Innocence Project, and the American Civil Liberties Union of Kansas testified in support of the bill. Additional written-only proponent testimony was provided by representatives of the Kansas Association of Counties and the Paul E. Wilson Project for Innocence and Post-Conviction Remedies at the University of Kansas School of Law. No other testimony was provided.

The House Committee amended the bill to:

- Clarify claimants would be entitled to reasonable attorneys fees and costs “incurred in the action brought pursuant to the bill,” rather than fees and costs “related to the litigation”;
- Clarify that related settlement agreements would be set off against claims;
- Remove a redundant provision regarding treatment as gross income; and
- Specify caption and service requirements and add a direct appeal provision.

In the Senate Committee on Judiciary hearing, a representative of the Midwest Innocence Project submitted written-only testimony supporting the bill.

[*Note:* Because the Senate Committee had previously heard SB 336, regarding similar subject matter, conferees on HB 2579 were asked to submit written-only testimony. Further information regarding SB 336 may be found in the supplemental note for that bill.]

The Senate Committee adopted amendments similar to those it and the Senate Committee of the Whole had adopted for SB 336, including:

- Reduce from \$80,000 to \$50,000 the amount of damages awarded for each year of imprisonment and provide for an initial payment not to exceed \$100,000 and an annuity not to exceed \$80,000 per year;
- In the subsection outlining those items the court may award to a claimant, remove vocational training, tuition assistance, and health insurance coverage and add “personal financial literacy assistance”;
- State the claimant would be entitled to tuition assistance and outline how such assistance would be provided;
- State the claimant would be entitled to participate in the Program and specify the extent of eligibility;
- Require the Attorney General to seek to recover damages for the State of Kansas for the benefit of the SGF from any persons who knowingly contributed to the wrongful conviction and imprisonment of the claimant;

- Require the KBI to provide confirmation of expungement and to expunge and destroy associated biological samples authorized by and given to the KBI; and
- State nothing in the bill would preclude KDOC from providing reentry services to a claimant.

According to the fiscal note prepared by the Division of the Budget on HB 2579, as introduced, the Office of the Attorney General indicates enactment of the bill could increase SGF expenditures by at least \$4.2 million in FY 2019, mostly for compensation of two wrongful convictions currently before the court. The estimate includes \$3.2 million of recovery calculated by multiplying \$80,000 per year of incarceration by 40 years and \$1.0 million in legal fees, non-monetary damages, and other unknown cases that may emerge if the bill is enacted. The Office of the Attorney General indicates there is an unknown number of legal cases that could lead to substantial payouts in the future, but their fiscal effect cannot be estimated at this time.

The Office of Judicial Administration indicates enactment of the bill could increase costs from additional time spent by judicial and nonjudicial personnel processing, researching, and hearing new cases and appeals in district court and appellate court related to wrongful convictions. Likewise, the court could see increased docket fee revenues from the additional filings. The precise fiscal impact cannot be estimated. The Kansas Department of Corrections and KBI indicate enactment of the bill, as introduced, would have no fiscal effect.

Any fiscal effect associated with enactment of the bill is not reflected in the *FY 2019 Governor's Budget Report*.

A fiscal note was not immediately available on the bill, as amended by Senate Committee.