STATE OF NEW YORK

3978--A

2019-2020 Regular Sessions

IN ASSEMBLY

January 31, 2019

Introduced by M. of A. AUBRY -- read once and referred to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the court of claims act and the tax law, in relation to claims for unjust conviction; to amend the education law, in relation to establishing wrongful conviction recovery scholarships; and to amend the civil service law, in relation to allowing additional credits for the wrongfully convicted

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "wrongful conviction recovery act".

§ 2. Section 8-b of the court of claims act, as added by chapter 1009 of the laws of 1984, subdivision 2 as amended by chapter 210 of the laws of 2007, is amended to read as follows:

§ 8-b. Claims for unjust conviction [~~and imprisonment~~]. 1. The legislature finds and declares that innocent persons who have been wrongly convicted of crimes [~~and subsequently imprisoned~~] have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages. The legislature intends by enactment of the provisions of this section that those innocent persons who can demonstrate by [~~clear and convincing~~] **a preponderance of the** evidence that they were unjustly convicted [~~and imprisoned~~] be able to recover damages against the state. In light of the substantial burden of proof that must be carried by such persons, it is the intent of the legislature that the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, shall, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.

2. Any person convicted [~~and subsequently imprisoned~~] for one or more felonies or misdemeanors against the state which he **or she** did not commit may, under the conditions hereinafter provided, present a claim for damages against the state. In scheduling court appearances and filing deadlines, the court shall give docket priority at each stage of the proceeding to such claims for damages under this subdivision where the claimant asserts proof of innocence through DNA evidence. Any adjournments granted in the course of such a proceeding should be for as short a time as is practicable.

3. In order to present the claim for unjust conviction [~~and imprisonment~~], claimant must establish by documentary evidence that:

(a) he **or she** has been convicted of one or more felonies or misdemeanors against the state [~~and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence~~]; and

(b) (i) he **or she** has been pardoned upon the ground of innocence of the crime or crimes for which he **or she** was sentenced and which are the grounds for the complaint; or (ii) his **or her** judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he **or she** was found not guilty at the new trial or he **or she** was not retried and the accusatory instrument dismissed; provided that the [~~judgement~~] **judgment** of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) [~~paragraph (a), (b), (c), (e) or (g) of~~] subdivision one of section 440.10 of the criminal procedure law; or (B) [~~subdivision one (where based upon grounds set forth in item (A) hereof, two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of~~] section 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of New York; and

(c) his **or her** claim is not time-barred by the provisions of subdivision seven of this section.

4. The claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that (a) he **or she** did not commit any of the acts charged in the accusatory instrument or his **or her** acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state, and (b) he **or she** did not by his **or her** own conduct cause or bring about his **or her** conviction. The claim shall be verified by the claimant. If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim, either on its own motion or on the motion of the state.

5. In order to obtain a judgment in his **or her** favor, claimant must prove by [~~clear and convincing~~] **a preponderance of the** evidence that:

(a) he **or she** has been convicted of one or more felonies or misdemeanors against the state [~~and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence~~]; and

(b) (i) he **or she** has been pardoned upon the ground of innocence of the crime or crimes for which he **or she** was sentenced and which are the grounds for the complaint; or (ii) his **or her** judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he **or she** was found not guilty at the new trial or he **or she** was not retried and the accusatory instrument

dismissed; provided that the [~~judgement~~] judgment of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) [~~paragraph (a), (b), (c), (e) or (g) of~~] subdivision one of section 440.10 of the criminal procedure law; or (B) [~~subdivision one (where based upon grounds set forth in item (A) hereof two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of~~] section 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of New York; and

(c) he or she did not commit any of the acts [~~charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument~~] or omissions for which he or she was convicted or his or her acts or omissions did not constitute a felony or misdemeanor against the state; and

(d) he or she did not by his or her own conduct cause or bring about his or her conviction.

6. If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him or her, provided, if the claimant was incarcerated, such sum shall not be less than an award calculated at a rate of one million dollars per year during which the claimant was incarcerated and was not under sentence for a separate crime. The court may also award reasonable attorneys' fees incurred in the claimant's defense at trial, including any post-trial motions or appeals, in the process of vacating or reversing his or her criminal conviction, and in the pursuit of a claim under this section.

7. Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of the chapter of the laws of two thousand nineteen that amended this section shall file his or her claim within two years after [~~the~~] such effective date [~~of this section~~]. Any person claiming compensation under this section based on a pardon that was granted on or after the effective date of this section or the dismissal of an accusatory instrument that occurred on or after the effective date of the chapter of the laws of two thousand nineteen that amended this section shall file his or her claim within [~~two~~] three years after the pardon or dismissal.

§ 3. Subsection (c) of section 612 of the tax law is amended by adding a new paragraph 43 to read as follows:

(43) The amount of any damage award amounts received pursuant to section eight-b of the court of claims act and not excludable from federal adjusted gross income.

§ 4. The education law is amended by adding a new section 668-h to read as follows:

§ 668-h. Wrongful conviction recovery scholarships. 1. Eligible persons. Notwithstanding subdivisions three and five of section six hundred sixty-one of this article, individuals pursuant to section eight-b of the court of claims act that have been determined to be entitled to a judgment for unjust conviction or upon their election any children of an individual having been determined to be entitled to a judgment for unjust conviction shall be eligible to receive a wrongful conviction recovery scholarship.

2. Amount. (a) The president shall grant annual scholarships to any person eligible pursuant to subdivision one of this section. Recipients

shall be granted annual scholarships if they are attending an institution of the city university of New York or an institution of the state university of New York including the statutory colleges at Cornell, the college of environmental science and forestry at Syracuse and the college of ceramics at Alfred. The annual award shall be an amount equal to the tuition charged at such institution provided that, notwithstanding any provision of law to the contrary, the tuition charged to award recipients shall not exceed that charged to state resident students attending such institution; the mandatory fees charged at such institution; and the non-tuition cost of attendance at such institution or college, provided that the scholarship shall not exceed an amount that is equal to the total cost of attendance determined for federal Title IV student financial aid purposes, less all other scholarships and grants provided by New York state, other states, the federal government, or other governments, and the amount of educational benefits paid under any program that would duplicate the purposes of this program, provided that any scholarships or grants provided to a recipient by the institution which are intended to fund any portion of the difference between the annual state award and the actual costs of attendance at any such institution shall not be considered to duplicate the purposes of this program.

(b) "Non-tuition cost of attendance", as used in this subdivision, shall mean: (i) the actual amount charged by the institution for room and board, and (ii) an allowance for transportation, books and supplies as determined by the president and as approved by the director of the budget, provided that such determination shall be made no later than December first of each year for use in the succeeding academic year. In the event a student does not incur room or board charges at the institution, "non-tuition cost of attendance" shall mean an allowance for room and board as determined by the president and approved by the director of the budget. In determining allowances pursuant to this subparagraph, the president may take into consideration the allowances provided for in the Pell grant program.

(c) In no event shall the combination of all student financial aid received by a student exceed a recipient's total cost of attendance at the institution being attended.

3. Duration. Awards under this section shall be payable for each of not more than four academic years of undergraduate study or five academic years if a program normally requires five years, as defined by the commissioner pursuant to article thirteen of this title.

§ 5. The civil service law is amended by adding a new section 85-d to read as follows:

§ 85-d. Additional credits allowed for the wrongfully convicted. 1. Additional credit authorized. Additional credits shall be allowed to successful claimants under section eight-b of the court of claims act in competitive examinations for original appointment. (a) On all eligible lists resulting from competitive examinations, the names of eligible persons shall be entered in the order of their respective final earned ratings on examinations, with the name of the eligible person with the highest final earned ratings at the head of such list, provided, however, that for the purpose of determining final earned ratings, successful claimants under section eight-b of the court of claims act shall be entitled to receive an additional ten points in a competitive examination for original appointment.

(b) Such additional credit shall be added to the final earned rating of such successful claimant after he or she has qualified in the compet-

itive examination and shall be granted only at the time of establishment of the resulting eligible list.

2. Application for additional credit; proof of eligibility; establishment of eligible list. Any candidate, believing himself or herself entitled to additional credit in a competitive examination as provided in this section, may make application for such additional credit at any time between the date of his or her application for examination and the date of the establishment of the resulting eligible list. Such candidates shall be allowed a period of not less than two months from the date of the filing of his or her application for examination in which to establish by appropriate documentary proof his or her eligibility to receive additional credit under this section. At any time after two months have elapsed since the final date for filing applications for a competitive examination for original appointment, the eligible list resulting from such examination may be established, notwithstanding the fact that a successful claimant who has applied for additional credit has failed to establish his or her eligibility to receive such additional credit. A candidate who fails to establish, by appropriate documentary proof, his or her eligibility to receive additional credit by the time an eligible list is established shall not thereafter be granted additional credit on such eligible list.

3. Use of additional credit. (a) Except as otherwise provided in this subdivision, no person who has received a permanent original appointment in the civil service of the state or of any city or civil division thereof from an eligible list on which he or she was allowed the additional credit granted by this section as a successful claimant, shall thereafter be entitled to any additional credit under this section as a successful claimant.

(b) Where, at the time of establishment of an eligible list, the position of a successful claimant on such list has not been affected by the addition of credits granted under this section, the appointment of such successful claimant from such eligible list shall not be deemed to have been made from an eligible list on which he or she was allowed the additional credit granted by this section.

(c) If, at the time of appointment from an eligible list, a successful claimant is in the same relative standing among the eligible persons who are willing to accept appointment as if he or she had not been granted the additional credits as provided by this section, his or her appointment from such eligible persons shall not be deemed to have been made from an eligible list on which he or she was allowed such additional credits.

(d) Where a successful claimant has been originally appointed from an eligible list on which he or she was allowed such additional credit, but such appointment is thereafter terminated either at the end of the probationary term or by resignation at or before the end of the probationary term, he or she shall not be deemed to have been appointed, as the case may be, from an eligible list on which he or she is allowed additional credit, and such appointment shall not affect his or her eligibility for additional credit in other examinations.

4. Withdrawal of application; election to relinquish additional credit. An application for additional credit in a competitive examination under this section may be withdrawn by the applicant at any time prior to the establishment of the resulting eligible list. At any time during the term of existence of an eligible list resulting from a competitive examination in which a successful claimant has received the additional credit granted by this section, such successful claimant may elect,

prior to permanent original appointment, to relinquish the additional credit theretofore granted to him or her and accept the lower position on such eligible list to which he or she would otherwise have been entitled; provided, however, that such election shall thereafter be irrevocable. Such election shall be in writing and signed by the successful claimant, and transmitted to the department or the appropriate municipal civil service commission.

5. Roster. The department and each municipal commission shall establish and maintain in its office a roster of all such successful claimants appointed as a result of additional credits granted by this section to positions under its jurisdiction. The appointment of a successful claimant as a result of additional credits shall be void if such successful claimant, prior to such appointment, had been appointed as a result of additional credits granted by this section.

§ 6. This act shall take effect immediately and shall apply to claims filed on and after such date.