

## LEGISLATIVE BILL 523

Approved by the Governor February 11, 1992

Introduced by Kristensen, 37; Lindsay, 9

AN ACT relating to criminal procedure; to amend section 81-1850, Revised Statutes Supplement, 1991; to adopt the Convicted Sex Offender Act; to harmonize provisions; to eliminate provisions relating to evaluation of persons convicted of certain crimes, treatment of mentally disordered sex offenders, and the Sentencing Review Committee; to provide severability; and to repeal the original section, and also sections 29-2911 to 29-2914, 29-2916, 29-2917, 29-2919 to 29-2921, and 83-1081, Reissue Revised Statutes of Nebraska, 1943, and sections 29-2915 and 29-2918, Revised Statutes Supplement, 1990.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 15 of this act shall be known and may be cited as the Convicted Sex Offender Act.

Sec. 2. For purposes of the Convicted Sex Offender Act:

(1) Aftercare treatment program shall mean any public or private facility or service which offers treatment on an outpatient basis or in a minimally restricted setting, which treatment is appropriate for a convicted sex offender after he or she has successfully completed an inpatient treatment program operated by the Department of Public Institutions; and

(2) Convicted sex offender shall mean a person who is convicted of sexual assault in the first degree as provided in section 28-319, sexual assault in the second degree as provided in section 28-320, sexual assault of a child as provided in section 28-320.01, incest as provided in section 28-703, or attempt to commit sexual assault in the first degree pursuant to section 28-201 and sentenced to a term of imprisonment in a Department of Correctional Services adult correctional facility.

Sec. 3. Nothing in the Convicted Sex Offender Act shall be construed to prohibit a court from sentencing a person convicted of a crime identified in subdivision (2) of section 2 of this act to probation or

community service or imposing any other sentence or condition allowed by law.

Sec. 4. Within sixty days of the date of commitment to the Department of Correctional Services of a convicted sex offender to serve his or her sentence, the Department of Public Institutions shall conduct an evaluation of the offender for purposes of determining whether treatment in a treatment program operated by the Department of Public Institutions is appropriate for the offender. The evaluation process shall be based upon criteria and procedures established by the Department of Public Institutions. The Department of Correctional Services shall provide the Department of Public Institutions access to all correctional and presentence records determined by the Department of Public Institutions to be relevant to the evaluation process.

Sec. 5. (1) If the Department of Public Institutions determines that treatment in an inpatient treatment program operated by the Department of Public Institutions is not appropriate for a convicted sex offender, the offender may request the sentencing judge to review the determination in accordance with subsection (2) of this section.

(2) Within thirty days of the determination of the Department of Public Institutions that the treatment in an inpatient treatment program operated by the Department of Public Institutions is not appropriate for a convicted sex offender, the offender may apply to the sentencing judge for a review of the denial of treatment. The review shall be conducted under the following rules of procedure:

(a) The court may allow each party to call witnesses on its behalf at such party's expense. Witnesses may be subpoenaed at the expense of the party calling the witness;

(b) Each party shall be allowed to be represented by counsel at such party's expense;

(c) Each party may be allowed to cross-examine adverse witnesses;

(d) The Nebraska Evidence Rules shall not apply unless expressly provided for by law, and the court may consider all evidence which in its discretion is relevant to whether the determination of the department is appropriate;

(e) The court may affirm the determination of the department, remand the matter for further proceedings, or reverse or modify the determination if such determination is unsupported by competent, material, and substantial evidence in view of the entire

record as made on review or if the determination is arbitrary and capricious; and

(f) The review pursuant to this section shall not be subject to appeal.

Sec. 6. If the Department of Public Institutions finds that the convicted sex offender is a potential treatment candidate, the department may notify the sentencing court of its findings, provide the court a summary of the evaluation results, and request the court to decide whether the offender is eligible for future determination of sentence upon successful completion of an inpatient treatment program operated by the department. In making such decision, the court may consider (1) the evaluation results, (2) the nature of the crime, and (3) any other information the court considers relevant. The department shall consider the court's decision in determining whether the offender is appropriate for treatment.

Sec. 7. (1) If the Department of Public Institutions determines that treatment in an inpatient treatment program operated by the Department of Public Institutions is appropriate for a convicted sex offender, that the offender will enter the treatment program voluntarily, and that space is available in the program, the Director of Correctional Services shall transfer the offender to the treatment program designated by the Director of Public Institutions for treatment. The Department of Correctional Services shall be responsible for physical transfer of the offender to the treatment facility.

(2) If the Department of Public Institutions determines that treatment in an inpatient treatment program operated by the Department of Public Institutions is not appropriate for a convicted sex offender, the offender shall serve the sentence in a facility operated by the Department of Correctional Services and may participate in treatment offered by the Department of Correctional Services if the Department of Correctional Services determines that such treatment is appropriate for the offender. The Department of Correctional Services may make a recommendation concerning treatment as provided in subsection (4) of this section.

(3) If the Department of Public Institutions determines that treatment in an inpatient treatment program operated by the Department of Public Institutions is not initially appropriate for a convicted sex offender but may be appropriate at a later time, a treatment decision may be deferred until a

designated time, no later than two and one-half years prior to the offender's earliest parole eligibility date, when the offender will be reevaluated.

(4) If the Department of Correctional Services determines that an offender participating in treatment offered by the Department of Correctional Services will benefit from a treatment program operated by the Department of Public Institutions, the Department of Correctional Services shall notify the Department of Public Institutions and recommend admission of the offender to the treatment program. The evaluation process to determine whether such offender is to be admitted into a treatment program operated by the Department of Public Institutions pursuant to this subsection shall be based upon criteria and procedures established by the Department of Public Institutions and shall not be subject to appeal or review.

Sec. 8. (1) The inpatient treatment program operated by the Department of Public Institutions shall conduct annual reviews of each convicted sex offender in the program and submit annual progress reports to the sentencing court and the Department of Correctional Services.

(2) If the offender is uncooperative while in the inpatient treatment program or is found not to be amenable to treatment, the Director of Public Institutions shall cause the offender to be returned to the Department of Correctional Services in accordance with procedures established by the Department of Public Institutions. The Department of Correctional Services shall be responsible for physical transfer of the offender from the inpatient treatment facility to the Department of Correctional Services. The Department of Public Institutions shall, at the time of the transfer, provide the Department of Correctional Services a report summarizing the offender's response to and progress while in treatment and the reasons for the transfer and shall provide access to the treatment records as requested by the Department of Correctional Services.

(3) All days of confinement in a treatment program operated by the Department of Public Institutions shall be credited to the offender's term of imprisonment.

Sec. 9. If the Department of Public Institutions determines that the convicted sex offender has received the maximum benefit of the inpatient treatment program operated by the Department of Public Institutions and is ready for treatment in an aftercare treatment program, the person in charge of the inpatient

treatment program shall submit a written report to the sentencing court and the Department of Correctional Services documenting such findings and recommendations. Within thirty days of receipt of the report, the court shall conduct a hearing on the offender's status.

Sec. 10. (1) If the court finds that the convicted sex offender has successfully completed an inpatient treatment program operated by the Department of Public Institutions and would benefit from treatment in an aftercare treatment program under conditions set by the court consistent with public safety, the court may issue an order directing the Department of Correctional Services to release the offender and, notwithstanding the time limitations found in subsection (1) of section 29-2263, may resentence the offender to probation for a period of time not greater than the remainder of the original sentence. Successful participation in an aftercare treatment program designated by the court shall be a condition of probation.

(2) If the court in its discretion finds that the offender should not be released to an aftercare treatment program, the court may issue an order (a) denying redetermination of the sentence or (b) modifying the original sentence to allow eligibility for parole at an earlier date than allowed by the original sentence. The offender shall be returned to serve the remainder of the sentence in a facility operated by the Department of Correctional Services and may participate in treatment offered by the Department of Correctional Services if the Department of Correctional Services determines that such treatment is appropriate for the offender.

(3) The court may exercise other sentence redetermination options in accordance with the treatment needs of the offender, the safety of society, and state law, except that the court shall not return the offender to an inpatient treatment program operated by the Department of Public Institutions.

Sec. 11. If the convicted sex offender has been treated in an inpatient treatment program operated by the Department of Public Institutions and is resentenced to probation, the Department of Correctional Services shall release the offender to the probation officer responsible for the offender. The Department of Public Institutions shall develop an individual discharge plan and provide the designated aftercare treatment program a copy of the discharge plan and relevant treatment information.

Sec. 12. (1) The designated aftercare

treatment program may make recommendations to the responsible probation officer concerning treatment placement changes for a convicted sex offender and shall submit written reports documenting its findings and recommendations. Within thirty days of receipt of a report, the probation officer shall review the report, develop a written statement supporting or opposing the recommendations, and submit the report and statement to the sentencing court. Within thirty days of receipt of the report and statement, the court shall conduct a hearing regarding placement.

(2) If the court determines that the treatment needs of the offender warrant a placement change, the court may issue an order modifying the conditions of probation consistent with public safety and requiring successful participation in an alternative designated aftercare treatment program.

(3) If the court determines that the offender no longer requires active aftercare treatment, the court may issue an order removing the requirement of aftercare treatment as a condition while maintaining or modifying other conditions of probation.

(4) If the court determines that the treatment needs of the offender do not warrant alternative placement, the offender may be returned to the original designated aftercare treatment program for further treatment.

Sec. 13. (1) Each person committed as a mentally disordered sex offender pursuant to sections 29-2911 to 29-2921 as such sections existed prior to the effective date of this act who is being treated in a regional center or other secure public institution operated by the Department of Public Institutions and has at least one year remaining on his or her sentence as of such date shall, within one hundred eighty days after such date, be returned to the district court which committed him or her for review and disposition consistent with the terms of this section.

(2) Each person committed to a regional center or other secure public institution operated by the Department of Public Institutions as a mentally disordered sex offender by a court pursuant to sections 29-2911 to 29-2921 as such sections existed prior to the effective date of this act who is in a facility operated by the Department of Correctional Services awaiting treatment as of such date shall be placed in a treatment facility operated by the Department of Public Institutions for evaluation and treatment as soon as practical after space and staff become available.

Within thirty days of such placement, the Department of Public Institutions shall determine, based on criteria and procedures established by the Department of Public Institutions, whether the offender will remain in the treatment program or be returned to the Department of Correctional Services to await court review or the end of his or her sentence. Within thirty days after the evaluation-and-treatment period, if the offender has at least one hundred eighty days remaining on his or her sentence, he or she shall be returned to the committing district court for review and disposition consistent with the terms of this section.

(3) The Department of Public Institutions shall prepare and present a report and recommendations for each offender to be reviewed by the district court under subsection (1) or (2) of this section.

(4) Each person identified in subsections (1) and (2) of this section who was committed as a mentally disordered sex offender by a court after having entered a plea of guilty or nolo contendere shall, upon return to the district court, elect whether to be resentenced under the Convicted Sex Offender Act or continue his or her commitment pursuant to sections 29-2911 to 29-2921 as such sections existed prior to the effective date of this act.

(5) For each person identified in subsections (1) and (2) of this section who was committed as a mentally disordered sex offender by a court after having entered a plea of not guilty and for each person identified in subsection (4) of this section who elected to be resentenced under the act, subsections (6), (7), and (8) of this section shall apply.

(6) If the court finds that the offender is treatable in an inpatient treatment program operated by the Department of Public Institutions, the offender shall be returned to or placed in such a treatment program and sections 8 to 12 of this act shall apply.

(7) If the court finds that the offender is not amenable to treatment, is uncooperative in treatment, or has reached the maximum benefit of treatment in an inpatient treatment program operated by the Department of Public Institutions but cannot be placed in an aftercare treatment program under conditions set by the court consistent with public safety, the offender shall be placed in a facility operated by the Department of Correctional Services to serve the remainder of his or her original sentence.

(8) If the court finds that the offender has successfully completed an inpatient treatment program

operated by the Department of Public Institutions and can be treated in an aftercare treatment program under conditions set by the court consistent with public safety, the court shall proceed in accordance with section 10 of this act and sections 11 and 12 of this act shall apply.

Sec. 14. For purposes of evaluating the treatment process, the Office of Probation Administration, the Department of Correctional Services, the Board of Parole, and the designated aftercare treatment programs shall allow appropriate access to data and information as requested by the Department of Public Institutions.

Sec. 15. The Department of Public Institutions shall adopt and promulgate rules and regulations as necessary to carry out the Convicted Sex Offender Act.

Sec. 16. That section 81-1850, Revised Statutes Supplement, 1991, be amended to read as follows:

81-1850. (1) Upon request of the victim and at the time of conviction of the offender, the county attorney of the jurisdiction in which a person is convicted of a felony shall forward to the Board of Parole the name and address of any victim as defined in section 29-119 of the convicted person. The board shall include the name in the file of the convicted person, but the name shall not be part of the public record of any parole hearings of the convicted person. Any victim, including a victim who has waived his or her right to notification at the time of conviction, may request the notification prescribed in this section by sending a written request to the board any time after the convicted person is incarcerated and until the convicted person is no longer under the jurisdiction of the board or the Department of Correctional Services.

(2) A victim whose name appears in the file of the convicted person shall be notified by the Board of Parole:

(a) When a convicted person who is on parole is returned to custody because of parole violations; and

(b) If the convicted person has been adjudged a mentally disordered sex offender or is a convicted sex offender, when such person is released from custody or treatment.

Such notification shall be given in person, by telecommunication, or by certified or registered mail.

(3) A victim whose name appears in the file of the convicted person shall be notified by the Department



of Correctional Services:

(a) When a convicted person is granted a furlough or release from incarceration for twenty-four hours or longer;

(b) When a convicted person is released into community-based programs, including educational release, work release, and extended-leave programs. Such notification shall occur at the beginning and termination of any such program;

(c) When a convicted person escapes or does not return from a granted furlough or release and again when the convicted person is returned into custody; and

(d) When a convicted person is discharged from custody upon completion of his or her sentence.

(4) The Board of Parole and the Department of Correctional Services shall adopt and promulgate rules and regulations to carry out this section.

Sec. 17. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 18. That original section 81-1850, Revised Statutes Supplement, 1991, and also sections 29-2911 to 29-2914, 29-2916, 29-2917, 29-2919 to 29-2921, and 83-1081, Reissue Revised Statutes of Nebraska, 1943, and sections 29-2915 and 29-2918, Revised Statutes Supplement, 1990, are repealed.