# The Florida Senate

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Committee on Criminal Justice

## VICTIMS OF WRONGFUL INCARCERATION ACT IMPLEMENTATION AND CLAIMS

## Statement of the Issue

The Victims of Wrongful Incarceration Compensation Act (the Act)[1] has been in effect since July 1, 2008. There have been 10 claims filed under the Act to date, two of which have resulted in compensation for the claimants. Two of the remaining eight claims are currently in the processing and review stage with the Department of Legal Affairs, one is awaiting a ruling from the trial court in an early stage of the proceedings, and the other five claims were unsuccessful for reasons that are discussed below.

This issue brief examines the implementation of the Act including a closer look at the claims that have been filed to date, administrative issues raised by practitioners who have direct experience with the Act, and the Act as it relates to utilizing the claim bill process as an alternative for seeking compensation for wrongful incarceration.

## Discussion

### The Victims of Wrongful Incarceration Compensation Act – Chapter 961, F.S.

The Act provides a process whereby a person may petition the original sentencing court for an order finding the petitioner to be a wrongfully incarcerated person who is eligible for compensation upon a final order vacating his or her sentence based upon exonerating evidence.

At the earliest stage in the process, the Act provides an opportunity for the prosecuting authority to either acquiesce to or contest the petition. If the prosecuting authority contests the petition on grounds other than a "clean hands" issue (which the trial court should be able to resolve on the pleadings[2]) there is a hearing before an Administrative Law Judge (ALJ) who then reports findings of fact and recommendations to the court. The court then considers the ALJ's findings and makes the determination as to the person's status as a wrongfully incarcerated person and eligibility for compensation under the program.[3]

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[1] Chapter 961, F.S. (2008-39, L.O.F.).

[2] Section 961.04, F.S., has been commonly referred to as the "clean hands" provision of the Act. It states: A wrongfully incarcerated person is not eligible for compensation under the act if:
(1) Before the person's wrongful conviction and incarceration, the person was convicted of, or pled guilty or *nolo contendere* to, regardless of adjudication, any felony offense, or a crime committed in another jurisdiction the elements of which would constitute a felony in this state, or a crime committed against the United States which is designated a felony, excluding any delinquency disposition;
(2) During the person's wrongful incarceration, the person was convicted of, or pled guilty or *nolo contendere* to, regardless of adjudication, any felony offense; or
(3) During the person's wrongful incarceration, the person was also serving a concurrent sentence for another felony for which the person was not wrongfully convicted.

[3] Paragraph (2) of s. 961.03, F.S., states: "The prosecuting authority must respond to the petition within 30 days. The prosecuting authority may respond: (a) By certifying to the court that, based upon the petition and verifiable and substantial evidence of actual innocence, no further criminal proceedings in the case at bar can or will be initiated by the prosecuting authority, that no questions of fact remain as to the petitioner's wrongful incarceration, and that the petitioner is not ineligible from seeking compensation under the provisions of s. 961.04; or (b) By contesting the nature, significance, or effect of the evidence of actual innocence, the facts related to the petitioner's alleged wrongful incarceration, or whether the petitioner is ineligible from seeking compensation under the provisions of s. 961.04." If the prosecuting authority responds as set forth in paragraph (2)(b) by contesting the nature, significance or effect of the evidence of actual innocence, or the facts related to the petitioner's alleged wrongful incarceration, the court shall set forth its findings and transfer the petition to the division for

Upon approval of a wrongfully incarcerated person's status and eligibility, the person may then apply for compensation with the Department of Legal Affairs (Department). After the Department reviews and approves the application, the Chief Financial Officer (CFO) is authorized to pay compensation in the amount of $50,000 per year of imprisonment (adjusted for inflation beginning January 1, 2009) up to a $2 million limit, plus a tuition waiver. Additionally, the person is entitled to automatic administrative expunction of his or her criminal record associated with the wrongful conviction.

***Unsuccessful Claims Made Under Chapter 961, F.S.***

**James Richardson** was the first man to file a claim under the Act. Mr. Richardson was convicted of murdering one of his children by poisoning (although all of his seven children and step-children died during the tragedy), in Arcadia in 1968. He spent over 21 years in prison, four of them on Death Row[4] before his sentence was eventually vacated and he was granted a new trial in 1989. The trial never occurred because Miami-Dade State Attorney Janet Reno - who had been assigned by the Governor to investigate allegations against the state of suborning perjury, using perjured testimony to obtain a conviction, and suppressing exculpatory evidence - agreed to the new trial and then filed a *nolle prosequi* in the case, thereby closing the case to further proceedings by the State.[5]

Mr. Richardson and DeSoto County subsequently settled a lawsuit over his wrongful prosecution for $150,000. The State contested his claim under the Act, however, and the matter went to a hearing before an ALJ on July 17, 2009.[6] At the hearing, Mr. Richardson testified that he did not kill his children and took two approaches to provide verifiable and substantial evidence of his innocence in support of his testimony.

He first relied upon the investigation conducted by the Miami-Dade State Attorney and the testimony of one of its participants. Mr. Richardson's second approach was to attempt to show that the babysitter had murdered the children by presenting facts regarding the timing of her access to the children, her ability to poison the children's lunch, her suspicious behavior during the minutes after the children became violently ill, and a possible motive for her actions.[7] A 1988 affidavit written by the Arcadia Chief of Police in which he opined that Mr. Richardson had been framed and that the babysitter was the guilty party was also presented as evidence at the hearing.[8]

The ALJ found there to be "clear and convincing evidence that the investigation leading up to (Mr. Richardson's) prosecution and conviction was incomplete," that there was "conflicting evidence," that critical facts were never determined, conflicting statements were withheld from the defense, the State presented perjured testimony from jailhouse informants and apparently the sheriff, and that the "investigation appeared to focus only on (Mr. Richardson) as a suspect and not also on others whose involvement was suspicious."[9]

The ALJ found that while there *was* an absence of evidence proving Mr. Richardson guilty beyond a reasonable doubt (at the murder trial), there *was not* sufficient evidence at the hearing to find Mr. Richardson actually innocent as required by the Act.[10]

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findings of fact and a recommended determination of whether the petitioner has established that he or she is a wrongfully incarcerated person who is eligible for compensation under this act. s. 961.03(4)(b), F.S.

[4] Richardson's death sentence was commuted to 25 years to life after the U.S. Supreme Court decided the 1972 *Furman v. Georgia* case that found unconstitutional procedural errors in capital cases and which required resentencing in cases where the death penalty had been handed down (408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).

[5] Florida Commission on Capital Cases, "Case Histories: A Review of 23 Individuals Released from Death Row," June 20, 2002; see also Sherrer, "Arcadia and the Twenty Year Effort to Exonerate James Joseph Richardson," http://justicedenied.org/arcadia.htm, September 11, 2008.

[6] *Id.* See also "Wrongly jailed inmate seeks compensation," the Associated Press, July 17, 2009, reported at http://www2.tbo.com.

[7] *Id.*

[8] *Id.*

[9] Recommended Order, *Richardson v. State*, Case No. 09-2718VWI, August 21, 2009.

[10] *Id.*

The ALJ explained that the Act requires consideration of the *factual sufficiency* (of the evidence) – "[i]n other words, proof of actual innocence is required."[11] Paragraph 38 of the ALJ's findings of fact indicates that "hearsay," "suggestions," "opinion testimony," memoranda outlining the Governor-ordered investigation and responses thereto, testimony by individuals as to what they considered during their respective investigations, nor Mr. Richardson's own testimony denying his guilt constituted verifiable and substantial evidence of his innocence.[12]

Upon reviewing the ALJ's recommended order and a transcript of the hearing, the trial court entered its order denying Mr. Richardson's claim.[13] Mr. Richardson appealed the court's order and it was affirmed by the Second District Court of Appeal without a written opinion.[14]

**Amber Baker's** claim for compensation came after her racketeering conviction was reversed by the appellate court because the evidence at trial was insufficient to prove that she knew her brother's escort service, for which she worked occasionally, was a front for prostitution, nor did the State refute her theory of events as presented at trial.[15] Baker had served 540 days when she was released on October 9, 2008. The State contested her claim under the Act and the trial court sent the matter to a hearing before an ALJ.[16]

The ALJ issued a recommended order on January 4, 2010, which found that Baker was not a credible witness and that she did not present the required "proof of factual innocence" at the hearing.[17] Evidence was presented at the hearing that was not before the trial court or appellate court due to Baker's not testifying at trial. The ALJ found that the new evidence presented at the hearing conflicted with Baker's hearing testimony that she was innocent.[18]

The ALJ also noted that the Act "requires a certain quality and quantity of evidence" to show the factual innocence necessary for a valid claim.[19] Finding the evidence lacking, the ALJ recommended denial of the claim.[20] The trial court entered its order denying the claim on January 12, 2010.[21]

**Mark Berube** was convicted of vehicular homicide in Osceola County in June of 2006 and was sentenced to prison. The Fifth District Court of Appeal determined that the trial court should have granted Berube's motion for judgment of acquittal and reversed the conviction.[22] Berube's claim under the Act went to a hearing before an ALJ. No testimony was presented although documentary evidence was submitted for review. At issue in the contested hearing were matters of statutory construction.

Section 961.02(4), F.S., states: "'Wrongfully incarcerated person' means a person whose felony conviction and sentence have been vacated by a court of competent jurisdiction and, with respect to whom pursuant to the requirements of s. 961.03, the original sentencing court has issued its order finding that the person *neither committed the act nor the offense that served as the basis for the conviction and incarceration* and that the person did not aid, abet, or act as an accomplice or accessory to a person who committed the act or offense." Berube argued that because the appellate court found that he had not *acted* with the requisite level of recklessness

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[11] *Id.*
[12] *Id.*
[13] *Richardson v. State*, Case No. 09-2718VWI, Final Order, October 23, 2009.
[14] *Richardson v. State*, 2010 WL 5464239 (Fla. 2d DCA December 29, 2010), referencing *Fessenden v. State*, 2010 WL 4260952 (Fla. 2d DCA Oct. 29, 2010) which will be discussed herein. To second-guess the ALJ, the trial court and the appellate court is futile, but nonetheless, the question arises: Some 41 years after a crime occurred, exactly what "verifiable and substantial evidence" is likely to be available to a claimant?
[15] *Baker v. State*, 990 So.2d 1221 (Fla. 1st DCA).
[16] *State v. Baker*, Case No. 2006 CF 001468 A, Escambia County, Order on Amber Baker's Petition for Compensation, May 6, 2009.
[17] *Baker v. State*, Case No. 09-5813VWI, Recommended Order, January 4, 2010.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *State v. Baker*, Case No. 2006 CF 001468 A, Escambia County, Order, January 12, 2010.
[22] *Berube v. State*, 6 So.3d 624 (Fla. 5th DCA 2008).

sufficient to prove vehicular homicide, he committed neither the offense nor the *act* underlying the offense and therefore fit the statutory definition of "wrongfully incarcerated person."[23]

The ALJ found Berube's argument to be without merit. Noting the statute's use of the words "act" and "offense" disjunctively, not conjunctively, the ALJ concluded that the Legislature intended the words to mean two different things.[24] The recommended order also found that the Legislature did not intend to compensate persons under the Act whose convictions were overturned for reasons of "legal insufficiency" which is why the Act requires verifiable and substantial evidence of "actual innocence."[25] The ALJ's recommended order concludes by explaining: "The apparent purpose of the Act is to compensate persons who were completely innocent of the crimes charged, *i.e.*, to compensate persons who were convicted and incarcerated as a result of, for example, mistaken identifications, planted evidence, or perjury where the wrongfulness of the conviction is discovered due to exonerating and/or new evidence such as DNA testing or newly-discovered witnesses."[26] The trial court adopted the findings and conclusions of the ALJ's recommended order and denied Berube's claim.[27]

In July of 1998, **John Fessenden's** grand theft and racketeering convictions were reversed because the conduct did not, as a matter of law, constitute grand theft and he subsequently filed a petition for compensation under the Act.[28] The trial court dismissed the petition because it found that Fessenden was not a "wrongfully incarcerated person." An appeal was taken to the Second District Court of Appeal. The first and only (to date) appellate level opinion construing the Act affirmed the trial court's dismissal of the petition on October 29, 2010.[29]

Fessenden argued on appeal that because his conduct did not fit within the elements of grand theft or racketeering, he therefore did not commit an offense under the definition of "wrongfully incarcerated person." The Second District Court of Appeal determined that Fessenden's criminal conviction was vacated due to an appellate court ruling based upon a "matter of law" and not based upon "exonerating evidence" as required by s. 961.03(1)(a), F.S.[30]

In its analysis, the court explained that a reversal on appeal based upon lack of evidence, a verdict of not guilty, or a judgment of acquittal at trial, were not meant by the Legislature to be construed as evidence of "actual innocence." The court reasoned that a not guilty verdict meant that the jury found that the State had not proven the case beyond a reasonable doubt, which is substantially different than a finding of "actual innocence." Further, a trial court's *legal* determination that the State has not met its burden of proving a *prima facie* case (and therefore that the defendant is entitled to a judgment of acquittal) does not lend itself to a remedy under the Act because the *legal* ruling on the lack of proof does not amount to a finding of "actual innocence." Therefore, the court reasoned that an appellate ruling that, as a *matter of law*, the State did not present evidence that supports a finding of guilt beyond a reasonable doubt is not a finding of "actual innocence."[31]

The court also compared the "streamlined claims process" created by the Act to waivers of sovereign immunity in tort cases where the State is a "wrong-doer"– although the Act is not such a waiver[32] – and opined that the Act should be strictly construed in favor of the State just as waivers of sovereign immunity are so construed. "Under such a strict construction, an order vacating a conviction and sentence based on [a] legal ruling…is not an order 'based upon exonerating evidence', as required by section 961.03(1)(a)."[33]

**John Fitzgibbons'** petition for compensation was filed after his convictions for sexual battery were reversed due to an error committed by the trial court in its exclusion of a witness' testimony and he was found not guilty at a

[23] *Berube v. State*, Case No. 09-5640VWI, Recommended Order, February 2, 2010.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *State v. Berube*, Case No. 2006-CF-39, Order Denying Petition, March 24, 2010.
[28] *Fessenden v. State*, 713 So. 2d 1093 (Fla. 2d DCA 1998).
[29] *Fessenden v. State*, 52 So. 3d 1 (Fla. 2d DCA 2010).
[30] *Id.*
[31] *Id.*
[32] *See* s. 961.06(7), F.S.
[33] *Id.*

new trial. The State contested the petition for compensation citing, among other things, Fitzgibbons' prior felony conviction which made him ineligible for compensation under s. 961.04, F.S.[34] The trial court, therefore, dismissed Fitzgibbons' petition.[35]

***Successful Claims Made Under Chapter 961, F.S.***

**Leroy McGee** and **James Bain** filed successful claims. Leroy McGee is the first person to receive compensation by having the trial court grant his petition without further proceedings. James Bain is the second. Mr. McGee refused to accept his compensation from the CFO for months in an effort to secure payment of attorney fees to the attorney who assisted him with the claim for compensation.[36]

James Bain spent 35 years in prison for a sexual battery that DNA evidence showed he did not commit. The State did not contest his claim, but it took five months for the claim to make its way through the process at the Department of Legal Affairs and the Office of the Chief Financial Officer.[37] Bain's lawyers and advisors used the delay to try to secure an annuity that was both permissible under the Act and most beneficial to Mr. Bain.[38]

***Unresolved and Pending Claims***

**Juan Ramos'** petition for compensation has been assigned by Executive Order to the State Attorney's Office in the 7th Judicial Circuit because the current State Attorney in the 18th Circuit (the court of jurisdiction over the case) was an assistant public defender who served as co-counsel during the original trial.[39] The last event in the case was the State's Response to Ramos' Amended Petition, filed in October 2010.[40] The trial court has yet to rule on the petition.

Ramos was convicted of a neighbor's murder, which occurred in 1982, and sentenced to death. The evidence at trial included testimony regarding two dog scent-discrimination line-ups. The Florida Supreme Court vacated Ramos' conviction and remanded the case for a new trial in 1986 finding that the trial court should not have allowed the introduction of the scent-discrimination line-up evidence because the State failed to lay the proper predicate regarding the reliability and accuracy of such evidence.[41] At the April 1987 retrial of the case, Ramos was acquitted.[42]

Ramos' amended petition is contested by the State. One of the issues raised is whether Ramos is ineligible for compensation under the Act by virtue of a felony conviction in Cuba many years ago. The parties have submitted documentary and testimonial evidence (in the form of a partial trial transcript from the first Ramos trial) with their pleadings.[43]

Another issue raised by Ramos is related to the now-discredited and controversial dog handler, John Preston, whose dog performed the scent-discrimination line-up.[44] The State's response submits, however, that by raising

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[34] The "clean hands" provision of the Act.
[35] *State v. Fitzgibbons*, Case No. 96-022303, Miami-Dade County, Order Denying Request, July 13, 2010.
[36] http://beta2.tbo.com, "Wrongfully convicted Fla. man refuses state compensation," posted Nov. 1, 2009. Section 961.06(1)(d), F.S. provides for reasonable attorney's fees and expenses incurred and paid by the claimant during the criminal case and appeals but not for the matters related to the Act.
[37] Discussion with Innocence Project of Florida Executive Director, August 3, 2011.
[38] Discussion with Innocence Project Executive Director, August 3, 2011; s. 961.06(4), F.S., requires: (4) The Chief Financial Officer shall purchase an annuity on behalf of the claimant for a term of not less than 10 years. The terms of the annuity shall: (a) Provide that the annuity may not be sold, discounted, or used as security for a loan or mortgage by the applicant. (b) Contain beneficiary provisions for the continued disbursement of the annuity in the event of the death of the applicant.
[39] Office of the Governor, Executive Order 10-149, July 19, 2010.
[40] *State v. Ramos*, Case No. 82-01321-CF-A, Brevard County, State's Response to Amended Petition, October, 2010.
[41] *Ramos v. State*, 496 So. 2d 121 (Fla. 1986).
[42] *State v. Ramos*, Case No. 82-01321-CF-A, Brevard County, Amended Petition and State's Response, October, 2010.
[43] *Id.*
[44] See http://www.innocenceproject.org/Content/William _Dillon.php, http://www.innocenceproject.org/Content/Wilton_Dedge.php, http://wrongful-convictions.blogspot.com/2009/08, and *Dedge v. State*, 442 So. 2d 429 (Fla. 5th DCA 1983).

the dog scent issue Ramos is attempting to blur the focus of the proceedings under the Act which require that he show "actual factual innocence" based upon clear and convincing evidence. The State argues that a not guilty verdict (in the second trial) is not a finding of actual innocence.[45] The Ramos petition remains unresolved at the initial trial court review phase for now.

Also pending, but at a different stage in the process, are the **Jarvis McBride** and **Luis Diaz** applications for compensation. Both men have been deemed to be eligible for compensation by the trial courts, and have completed their applications and submitted them to the Department of Legal Affairs as required by s. 961.05, F.S. Presumably their applications are being processed.

***Administrative Issues and Potential Changes to the Act the Legislature May Want to Explore***

The claims that have been raised under the Act have helped to highlight several issues:

- The Act contains time limitations for pleadings to be filed,[46] for the ALJ to conduct the fact-finding hearing if the trial court orders a hearing[47] and to submit findings and a recommendation to the trial court,[48] and for the trial court to make a final determination subsequent to receiving the ALJ's findings and recommendation.[49] *There is no existing time limitation on the trial court's initial determinations and orders at the beginning of the process, however.*

  Depending upon how the prosecutor responds under s. 961.03(2), F.S., the court is expected to make its own findings and either certify the petition to the Department of Legal Affairs for payment, dismiss the petition, or transfer the matter to the ALJ for a hearing on the facts.[50] Failure of the Act to set forth time limitations at this early stage of the proceedings may result in delays as suggested by the Ramos case mentioned above.

- Regarding the application process, questions have arisen regarding what the phrase "*whether a claim…meets the requirements of the Act"* actually means. Is the Department of Legal Affairs required to simply *collect and check the application for accuracy, or is some legal or factual analysis required?*[51]

  If a legal or factual "analysis" (that extends beyond collecting a complete and accurate application) is contemplated by the Act, it lacks a way for the Department to insert itself for purposes of *contesting the eligibility of the claimant* who has, after all, been found to be eligible for compensation by the trial court. It appears, then, that the Department's role is administrative only and that "*whether a claim meets…the requirements of the Act"* should be construed to limit the Department's responsibility to collecting and checking the application for accuracy only.

  The Department is, however, given the apparent authority to "deny" an application if the claimant does not correct errors or omissions and supplement the application as necessary within a 15-day period.[52] An

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[45] *Id.*

[46] Section 961.03(1)(b), F.S., requires the petition to be filed within 90 days of the conviction and sentence being vacated. Section 961.03(2), F.S., requires the prosecutor to respond to the petition within 30 days.

[47] Section 961.03(6)(a), F.S., requires the hearing to be held no more than 120 days after the transfer of the petition to the ALJ.

[48] The ALJ has 45 days to issue an order setting forth the findings and recommendation after the hearing adjourns according to s. 961.03(c), F.S.

[49] The trial court has 60 days to issue its final order pursuant to the requirements of s. 961.03(6)(d), F.S.

[50] See subsections (3) and (4) of s. 961.03, F.S.

[51] The Department has 90 days within which to "*process and review*" the completed application, and once the Department determines "*whether a claim for compensation meets the requirements of (the) Act,*" it shall notify the claimant within 5 business days. s. 961.05, F.S.

[52] As set forth in s. 961.05, F.S., the application process requires the claimant who has been determined to be eligible for compensation to initiate the application within two years of the court finding him or her eligible. There is some lee-way given for the finalization of the application in that the Department of Legal Affairs has 30 days to notify the claimant of any errors or omissions, and corrections can be made within 15 days of timely notification.

application *may not be denied* (*implying* that a denial is *possible*) if timely notification of errors or omissions is not made by the Department.[53] The authority to "deny" begs the question: what, if any, actual effect would such a "denial" have on the claim? The question is not addressed by the Act. Although the *authority to deny* an application seems to exceed the authority necessary for a simple document "process and review" this appears to be the only place in the Act where any authority is conveyed to the Department.[54]

Since the Department is apparently not a true party to the action, there appears to be no incentive to expedite matters at the "process and review" phase. A 90-day time limitation is specified, but there is no evident recourse for the claimant if the time limitation is exceeded.[55] Perhaps clarification of the role of the Department would help move completed applications through the process with more confidence and less delay which is, no doubt, attributable to a more extensive review than is required by the Act.

- The statutory language regarding the *purchase of an annuity* by the Chief Financial Officer has perhaps been *somewhat restrictive* and forecloses options that might otherwise be available to provide the most benefit to the claimant. For example, more than one annuity (one with short-term growth, another with long-term growth) might be beneficial in some cases. Also, there are income tax ramifications that could be avoided or at least minimized, when allowed by the tax code, if the language were changed to allow for a structured settlement arrangement.[56]

***Claim Bills Seeking Compensation for Wrongful Incarceration, "Clean Hands" and the Burden of Proof***

The Legislature has passed two claim bills recently – one in 2005, the other in 2008 - to compensate people who were wrongfully incarcerated in Florida's prisons. Wilton Dedge, who was in prison for 22 years and who was exonerated by DNA evidence in 2004, was compensated in the amount of $2 million in 2005 before the Legislature passed the Act. It is probably safe to say that his case was instrumental in the passage of the Act.

Alan Crotzer's $1.25 million claim bill passed in 2008, the same year the Act was under consideration by the Legislature. He had been wrongfully incarcerated for 24 ½ years before being cleared by DNA evidence in 2006. It should be noted that Mr. Crotzer would not have been eligible for compensation under the Act because of the Act's "clean hands" provision. His past includes a convenience store burglary and theft as well as possession of cannabis while in prison.

William Dillon has sought relief through the claim bill process because he, too, is unable to meet the "clean hands" requirement of the Act. Mr. Dillon has a prior felony possession of a controlled substance (a Quaalude) conviction.[57]

Mr. Dillon was convicted of murder in 1981. After DNA testing did not implicate him in the crime, Dillon was granted a new trial on the charges in November 2008 and he was freed from prison after serving nearly 27 years. The prosecutor decided not to retry the case citing loss of witnesses over the 27 year period.[58] It has been reported that the law enforcement authorities now have four new suspects in the murder case.[59]

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[53] s. 961.05(6), F.S.
[54] See s. 961.05(3), F.S., which authorizes rulemaking *but only regarding forms and procedures related to applications.*
[55] Staff discussion with attorneys representing Diaz, August 19, 2010. With regard to Bain, see http://www.wtsp.com "State drags heels on money for James Bain," posted February 17, 2011.
[56] Staff discussion with CFO staff, July 22, 2011.
[57] Of the 27 states that have statutory processes by which a wrongfully incarcerated person may seek compensation, Florida is the only state that requires "clean hands" prior to the wrongful conviction. There are some states that stop claim payments upon a new conviction, however this is not done in Florida. The policy decision at the time the statute was enacted was in favor of setting up an annuity for the claimant without a provision requiring the State to constantly "keep tabs" on a claimant for, potentially, the ten year pay-out period.
[58] Special Master Report, Senate Bill 46 (2011).
[59] June 21, 2011 posting to CNN news blog "This Just In," http://www.news.blogs.cnn.com/2011/06/21/ after -27-years-with-wrong-man-behind-bars-cops-have-four-new-murder-suspects.

William Dillon had a claim bill before the Legislature for consideration during the 2010 and 2011 Legislative Sessions. A bill has already been filed for consideration during the 2012 Session.

As part of the claim bill process a Special Master prepares a report that sets forth findings of fact, litigation history, conclusions of law, and the Special Master's recommendation to the Legislature as to the passage of the bill. Mr. Dillon's claim bill is the first of its kind to be considered after the effective date of the Act. The Special Master who reported on the bill in 2011 raised a question in his report about the appropriate burden of proof to apply in analyzing the Dillon bill, as compared to both the "new" Act and the Crotzer claim bill.

The Special Master decided – in the Dillon case – to apply the "preponderance of the evidence" burden of proof, but not before questioning whether the "clear and convincing" burden of proof required by the Act should be viewed as "a guide for legislative action on claim bills for wrongful incarceration…an expression of…intent and policy on the subject."[60] This question may require policy decisions by the Legislature if it is to be resolved with any finality.

The "preponderance of the evidence" standard is a *lesser burden* of proof applied in previous wrongful incarceration claim bills and those involving governmental torts. The Act's "clear and convincing evidence" burden is a *higher burden* of proof. The Special Master's quandary – whether the Legislature intends to have the *higher burden* apply for claim bills - is likely to arise again. It is possible that the burden of proof question may also raise a question about legislative policy with regard to "clean hands."

Legislators may want to consider the apparent incongruity in the process: the person who is prohibited by a prior felony from making a claim under the Act (which requires a high standard of proof) is not prohibited from seeking relief through a claim bill (which historically requires a lesser standard of proof). The differences between the Act and claim bill burdens of proof and "clean hands" expectations appear to be so intertwined that if the Legislature chooses to address one it may necessarily have to address the other. Otherwise, the policy clarification is not likely to result in long-lasting guidance for practitioners such as the Special Master in the Dillon claim bill from 2011.

Should the Legislature decide to address the policy issues mentioned herein, it may also choose to clarify the "administrative" issues discussed above.

Although potential policy and administrative issues have arisen since the Act has been in effect, as they often do with any ground-breaking legislation, these issues have not likely diminished the real value of the Victims of Wrongful Incarceration Compensation Act, especially to the individuals who have made successful claims since its passage.

[60] Senate Bill 46, Special Master's Final Report, February 1, 2011.