

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 2408

INTRODUCER: Judiciary Committee and Senator Joyner

SUBJECT: Wrongful Incarceration Compensation

DATE: April 2, 2009 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	Fav/CS
2.			CJ	
3.			JA	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes  
 B. AMENDMENTS.....  Technical amendments were recommended  
 Amendments were recommended  
 Significant amendments were recommended

**I. Summary:**

The bill makes revisions to the Victims of Wrongful Incarceration Act (the Act). These revisions clarify inconsistent evidentiary standards in the Act. The procedures for processing a petitioner's fingerprints are altered to account for the submission of electronic fingerprints. The bill also simplifies the application process by eliminating the requirement that a wrongfully incarcerated person submit certain criminal history documentation.

The bill makes numerous technical revisions for consistency throughout the Act.

This bill substantially amends the following sections of the Florida Statutes: 961.02, 961.03, 961.05, and 961.06.

## II. Present Situation:

### **Victims of Wrongful Incarceration Act**

In 2008, the Legislature enacted the Victims of Wrongful Incarceration Compensation Act (the Act), under which a person who was convicted and incarcerated for a felony of which he or she was actually innocent may apply for compensation from the state.<sup>1</sup>

### ***Petition for a Finding of Wrongful Incarceration and Eligibility for Compensation***

Upon an order vacating a felony conviction and sentence becoming final, a defendant may petition the original sentencing court for a determination as to whether he or she qualifies as a “wrongfully incarcerated person.”<sup>2</sup> The petition must set forth with particularity verifiable and substantial evidence of actual innocence.<sup>3</sup> Additionally, the petitioner must state that:

- Prior to the person’s wrongful incarceration, he or she was never convicted of 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 juvenile delinquency disposition;
- During the person’s wrongful incarceration, the person was not convicted of any felony offense; and
- During the person’s wrongful incarceration, the person was not also serving a concurrent sentence for another felony for which the person was not wrongfully convicted.<sup>4</sup>

The petition must be filed within 90 days of the order vacating a conviction and sentence if the person’s conviction and sentence is vacated on or after July 1, 2008. For those persons whose conviction and sentence became final prior to July 1, 2008, the petition must be filed by July 1, 2010.<sup>5</sup>

### ***Prosecutor’s Response to Petition***

The prosecuting authority in the underlying felony must be provided proper notice of the filing of the petition.<sup>6</sup> Subsequently, the prosecutor has 30 days to respond by either:

- Certifying to the court that no further criminal proceedings in the case can or will take place, that no questions of fact remain as to the petitioner’s wrongful incarceration, and that the petitioner is not disqualified from seeking compensation; or
- By contesting the evidence of actual innocence, the related facts, or the petitioner’s eligibility for compensation.<sup>7</sup>

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<sup>1</sup> Chapter 2008-39, Laws of Fla.

<sup>2</sup> Section 961.03(1)(a), F.S.

<sup>3</sup> Section 961.03(1)(a)1., F.S.

<sup>4</sup> Section 961.03(1)(a)2., F.S. *See also* s. 961.04, F.S.

<sup>5</sup> Section 961.03(1)(b), F.S.

<sup>6</sup> Section 961.03(1)(a), F.S.

<sup>7</sup> Section 961.03(2), F.S.

If the prosecutor's response is not to contest the petition and the original sentencing court finds by clear and convincing evidence that the petitioner is a wrongfully incarcerated person, the court may certify to the Department of Legal Affairs (department) that the petitioner is also eligible for compensation.<sup>8</sup>

If the prosecutor contests the petition, the court will make a determination of eligibility, limited to the issues of prior or concurrent felonies and concurrent sentences during the period of incarceration before the court. If, based on those factors, the court finds by a preponderance of the evidence that the petitioner is ineligible, it must dismiss the petition.<sup>9</sup>

However, if the petitioner is eligible under those criteria (no prior or concurrent felonies), but the prosecutor contests the evidence of actual innocence or the related facts, the court must set forth its findings and transfer the petition to the Division of Administrative Hearings (division) for findings of fact and a recommendation to the court.<sup>10</sup>

### *Division of Administrative Hearings Procedures for Contested Petitions*

The petitioner must establish, by clear and convincing evidence before an administrative law judge, his or her status as a wrongfully incarcerated person and eligibility for compensation under the program.<sup>11</sup> The hearing must be conducted no later than 120 days after the petition is transferred from the original sentencing court. The prosecutor may appear to contest factual matters, or matters related to the nature, significance, and effect of the evidence of actual innocence. The administrative law judge must enter his or her findings of fact and recommendations with the original sentencing court within 45 days of the hearing's adjournment.<sup>12</sup>

The original sentencing court will review the order from the administrative law judge and enter its own order within 60 days.<sup>13</sup> The court may adopt or decline to adopt the findings of the administrative law judge. If the court finds the petitioner has met his or her burden of proof – based upon the administrative law judge's findings and the court's own assessment of the findings and recommendations – the court's own order must include a certification to the Department of Legal Affairs that the petitioner is a wrongfully incarcerated person who is eligible for compensation.<sup>14</sup>

The Act expressly provides that it does not establish any new due process or rights to appeal by creating this program to compensate the wrongfully incarcerated.<sup>15</sup>

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<sup>8</sup> Section 961.03(3), F.S.

<sup>9</sup> Section 961.03(4)(a), F.S.

<sup>10</sup> Section 961.03(4)(b), F.S.

<sup>11</sup> Section 961.03(5), F.S.

<sup>12</sup> Section 961.03(6), F.S.

<sup>13</sup> Section 961.03(6)(d), F.S.

<sup>14</sup> Section 961.03(7), F.S.

<sup>15</sup> Section 961.03(8), F.S.

### *Application for Compensation*

Within two years of the original sentencing court's order finding the person to be a wrongfully incarcerated person who is eligible for compensation, the person must initiate an application for compensation with the department.<sup>16</sup> The application must be submitted to the department for review and approval.<sup>17</sup>

The Act sets forth the required documentation and allows the department to adopt rules as necessary to carry out the program created by the Act. An applicant is required to submit:

- A certified copy of the order vacating the conviction and sentence;
- A certified copy of the original sentencing court's order finding the claimant to be a wrongfully incarcerated person who is eligible for compensation;
- Certified copies of the original judgment and sentence;
- Documentation demonstrating the length of the sentence served, including documentation from the Department of Corrections regarding the person's admission and release from the department;
- Positive proof of identification, including two full sets of fingerprints, along with a current form of photo identification;
- All supporting documentation of any fine, penalty, or court costs imposed and paid by the wrongfully incarcerated person;
- All supporting documentation of any reasonable attorney's fees and expenses; and
- Any other documentation, evidence, or information required by rules adopted by the department.<sup>18</sup>

After a review of the application, if the requirements are met, the department is directed to notify, within 15 days, the Chief Financial Officer to draw a warrant from the General Revenue Fund or another source designated by the Legislature for the purchase of annuity based on the total amount of compensation determined by the department.<sup>19</sup> The annuity will:

- Be for a term of not less than 10 years;
- Provide that the annuity may not be sold, discounted, or used as security for a loan or mortgage by the applicant; and
- Contain beneficiary provisions for the continued disbursement of the annuity upon the wrongfully incarcerated person's death.<sup>20</sup>

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<sup>16</sup> Section 961.05(1), F.S.

<sup>17</sup> Section 961.05(2), F.S. The Act provides that no estate of, or personal representative for, a decedent is entitled to apply on behalf of the decedent for compensation for wrongful incarceration.

<sup>18</sup> Section 961.05(4), F.S. The Act requires the Department of Legal Affairs to notify the applicant of any errors or omissions within 30 calendar days of receipt of the application. The claimant may then correct any errors or omissions within 15 days of this notification. Under the Act, the department may not deny an application for failure to submit the proper documentation or information if it failed to provide proper notice.

<sup>19</sup> Section 961.06(3), F.S.

<sup>20</sup> Section 961.06(4), F.S.

### ***Compensation for Wrongful Incarceration***

A person who is found to be a wrongfully incarcerated person and eligible for compensation is entitled to receive:

- Monetary compensation in the amount of \$50,000 for each year of wrongful incarceration. This amount will be prorated as necessary to account for a portion of a year. For those persons found to be wrongfully incarcerated after December 31, 2008, the Chief Financial Officer may adjust the annual rate of compensation for inflation;
- A tuition and fee waiver for up to 120 hours of instruction at any career center, community college, or state university;
- Immediate administrative expunction of the criminal record resulting from the wrongful incarceration; and
- Fines, penalties, court costs, and attorney's fees imposed and paid by the wrongfully incarcerated person and associated with the wrongful conviction and incarceration.<sup>21</sup>

The cap on all monetary payments under the Act is \$2 million. Prior to receiving the first compensation payment, the claimant must execute a release and waiver releasing the state or any agency, or any political subdivision, from any and all liability for present and future claims arising out of the factual situation in connection with the wrongfully incarcerated person's wrongful incarceration.<sup>22</sup>

### ***Limitations on Relief for Wrongful Incarceration***

A wrongfully incarcerated person may not submit an application for compensation under this program if the person has a lawsuit pending against the state or any agency in state or federal arising out of the facts in connection with the person's wrongful incarceration.<sup>23</sup> It is not clear under the Act if a person may apply for compensation if he or she received a prior civil judgment arising out of the wrongful incarceration. Additionally, the person may not submit an application for compensation under this program if the person is the subject of a claim bill which is pending, and may not pursue recovery under a claim bill once an application is filed.<sup>24</sup> The Act expresses that the compensation program is intended to be the sole redress for the person's wrongful incarceration.

### ***Waiver of Sovereign Immunity***

The bill includes a statement declaring that any compensation paid under the act does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person subject to the provisions of s. 768.28, F.S.<sup>25</sup>

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<sup>21</sup> Section 961.06(1), F.S.

<sup>22</sup> Section 961.06(5), F.S.

<sup>23</sup> Section 961.06(6)(a), F.S.

<sup>24</sup> Section 961.06(6)(b), F.S.

<sup>25</sup> Section 961.06(7), F.S.

### **Current Petitioner**

Only one wrongfully incarcerated person has filed a petition for compensation since the enactment of the program. James J. Richardson filed a petition for compensation under the Act on August 25, 2008. The state attorney's office has filed a response contesting the petition. Currently, the case has been reassigned to a different judge, and the parties are awaiting a determination of whether the case will proceed to a hearing before the division. Mr. Richardson's case is detailed below.

On October 25-26, 1967, the seven children of James Joseph Richardson died in Arcadia, Florida, after eating food laced with the pesticide parathion.<sup>26</sup> Mr. Richardson was convicted of first-degree murder in May 1967 and sentenced to death. In 1972, the sentence was commuted to life in prison. Thereafter, in August 1988, the Sarasota Herald Tribune revealed that the children's former babysitter, Betsy Reese, admitted to killing all seven of the Mr. Richardson's children.<sup>27</sup>

In October 1988, evidence was provided to Governor Bob Martinez that indicated that exculpatory evidence was not provided to Mr. Richardson's counsel prior to trial. Pursuant to the Governor's executive order, State Attorney Janet Reno of the Eleventh Judicial Circuit was assigned to conduct an investigation in to the murder. State Attorney Reno concluded that "[i]t is apparent, after a review of all evidence obtained in the original investigation and ensuing investigations, that not only couldn't the State prove James Richardson was guilty beyond a reasonable doubt, but James Richardson was probably wrongfully accused."<sup>28</sup>

In April 1989, Mr. Richardson was released from incarceration pending the final investigative report of State Attorney Reno. Subsequent to the conclusion of the investigation, all charges against Mr. Richardson arising out of the death of his children were nolle prossed<sup>29</sup> by the State Attorney, and Mr. Richardson's judgment, conviction, and sentence were vacated by the court in 1989.

### **III. Effect of Proposed Changes:**

The bill makes revisions to the Victims of Wrongful Incarceration Act (the Act). These revisions clarify inconsistent burdens of proof currently in the Act and further clarify evidentiary standards. The procedures for processing a petitioner's fingerprints are altered to account for the submission of electronic fingerprints. The bill also simplifies the application process by eliminating the requirement that a wrongfully incarcerated person submit certain criminal history documentation. In addition, the bill makes numerous technical revisions for consistency throughout the Act.

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<sup>26</sup> *State v. James Joseph Richardson*, Sworn Petition Seeking Status as a Wrongfully Incarcerated Person Who Is Eligible for Compensation, Case No. 3302-D (Fla. 12th Cir. Tr. Ct. 2008).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 4-5.

<sup>29</sup> A nolle prosequi, unlike a judgment of acquittal, has no probative value as to a defendant's guilt or innocence. *Holland v. State*, 432 So. 2d 60 (Fla. 1st DCA 1983).

### **Actual Innocence**

The bill defines “actual innocence” to mean that a person did not commit the act or the offense that served as the basis for the conviction and incarceration for which the person seeks compensation, and that the person did not aid, abet, or act as an accomplice to a person who committed the act. References to “actual innocence” are included throughout the Act. This definition may resolve any inconsistent interpretations of the term.

### **Evidentiary Standards**

The bill clarifies inconsistent evidentiary standards throughout the Act. Under current law, the petitioner must state that “verifiable and substantial” evidence of actual evidence exists and state with particularity the nature and significance of the “verifiable and substantial” evidence of actual innocence. The bill replaces “verifiable and substantial” evidence with “clear and convincing” evidence. Because the Act requires the court or the Division of Administrative Hearings” (division) to find wrongful incarceration by clear and convincing evidence, this change makes the petitioner’s pleading requirements consistent with the burden of proof.

Under existing provisions in the Act, the original sentencing court must make a determination from the pleadings and supporting documentation whether, by a preponderance of the evidence, the petitioner is eligible for compensation under s. 961.04, F.S. The bill eliminates the “preponderance of the evidence” reference because an evidentiary standard is not necessary for the court to determine, based upon the person’s criminal history, whether the person has committed a prior felony that would bar compensation.

### **Determination of Eligibility**

Under existing procedures in the Act, the prosecuting authority can contest whether the petitioner is eligible for compensation under the eligibility requirements denoted in s. 961.04, F.S. Additionally, if the petition is transferred to the division for a hearing, the division must make a determination whether the petitioner has committed a prior felony that would affect eligibility under the Act. The bill eliminates these requirements and specifies that the court makes a determination of eligibility under the Act.

Because determination of eligibility rests solely upon a review of a petitioner’s criminal history to determine if the person has committed a disqualifying felony, it does not appear to be necessary for the prosecutor to dispute eligibility or for the division to expend time during its hearing to make a determination of eligibility. Under the bill, the court would make an initial determination of eligibility upon review of the petitioner’s criminal history during the initial stages of the process.

### **Fingerprint Procedures**

The bill removes the requirement that a wrongfully incarcerated person submit two copies of fingerprints with his or her application and transfers this requirement to the initial petition process. In addition, the fingerprint procedures are significantly altered. Under the bill, within 30 days of filing the petition, the petitioner must submit fingerprints electronically for a state and

national criminal history records check. The bill provides that failure to comply with this time frame does not bar the person from receiving compensation under the Act.

The clerk of court must inform the petitioner of the process for having his or her fingerprints taken and submitted and provide information concerning law enforcement agencies or service providers that are authorized to submit fingerprints electronically to the Department of Law Enforcement (FDLE). The fingerprints must be taken in a manner approved by FDLE for state processing for a criminal history records check. The FDLE is directed to submit the fingerprints to the Federal Bureau of Investigation for national processing. Thereafter, FDLE must submit the results of the state and national record checks to the clerk.

The bill provides that the petitioner must not be charged for the cost of conducting the state and national criminal history records checks required by the Act, and specifies that FDLE will absorb all costs associated with these criminal history records checks.

### **Application Requirements**

Because certain court documents required to be submitted with the application may be readily obtained by the Department of Legal Affairs, the bill eliminates the requirement that a wrongfully incarcerated person submit:

- A certified copy of the order vacating the conviction and sentence;
- A certified copy of the original sentencing court's order finding the claimant to be a wrongfully incarcerated person who is eligible for compensation;
- Certified copies of the original judgment and sentence; and
- Documentation demonstrating the length of sentence served, including records from the Department of Corrections regarding the person's admission and release from the department.

Instead of this documentation, a wrongfully incarcerated person must submit identification of the original sentencing court and the criminal case number of the case or cases for which the person was wrongfully incarcerated to enable the department to obtain the necessary documentation to process the application. The bill preserves the requirement that the applicant submit supporting documentation of fines, fees, court costs, attorney's fees, and other documentation required by rules adopted by the department.

Upon receipt of the application, the department is directed to request that the clerk of the court provide a certified copy of the order vacating the conviction and sentence and certified copies of the original judgment and sentence. The department is also directed to request that the Department of Corrections provide documentation demonstrating the length of the sentence served, including the dates of the wrongfully incarcerated person's admission into and release from the custody of the Department of Corrections. The clerk and the Department of Corrections must provide this documentation at no charge to the department.



### **Limitation of Relief for Wrongful Incarceration**

Although the Act currently provides that a person may not apply for compensation if he or she has a lawsuit pending against the state or any agency, instrumentality, or political subdivision that arose out of the person's wrongful conviction and incarceration, it is not clear under the Act if a person would be precluded from applying for compensation if he or she previously received a civil judgment from a suit against the state. The bill specifies that a wrongfully incarcerated person may not submit an application for compensation if the person has received a prior judgment in his or her favor in a civil action against the state or any agency, instrumentality, or any political subdivision thereof arising out of the wrongfully incarcerated person's conviction and incarceration.

### **Effective Date**

The bill provides that the act shall take effect on July 1, 2009.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

Wrongfully incarcerated persons may incur minimal costs for the taking and submission of fingerprints if he or she utilizes a private fingerprint service provider. However, the bill relieves a wrongfully incarcerated person of the current obligation to compile certain court documentation for submission with the application for compensation.

#### **C. Government Sector Impact:**

The clerk of the court and the Department of Corrections may incur costs associated with providing certain documentation requested by the Department of Legal Affairs to process applications. Because the number of applicants per year is anticipated to be low, these costs are likely to be minimal.

The Department of Law Enforcement is responsible for the costs associated with the national and state criminal background checks of the wrongfully incarcerated person. Again, the number of applicants per year is anticipated to be low, and those costs are likely to be minimal.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on April 1, 2009:**

The committee substitute:

- Clarifies that a wrongfully incarcerated person must submit fingerprints within 30 days of filing the petition;
- Provides that failure to provide fingerprints within 30 days of filing the petition will not bar compensation under the act; and
- Specifies that the Department of Law Enforcement will be responsible for all costs associated with the state and national criminal records checks.

- B. **Amendments:**

None.