

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – The bill provides a mechanism to provide compensation and benefits to those who have been wrongfully incarcerated.

Promote personal responsibility –The bill provides that unpaid compensation and benefits cease upon the subsequent conviction of a felony.

B. EFFECT OF PROPOSED CHANGES:

For those people who are actually innocent of a crime for which they have been incarcerated, there are very few, if any, legal remedies available due to the doctrines of sovereign immunity¹, absolute immunity², and qualified immunity³. Thus there are individuals who have been incarcerated for crimes that they did not commit with no avenue for compensation. In recent history, five people in Florida have been exonerated based on DNA.⁴ In the past 10 years, five claimants have petitioned the Legislature for compensation for wrongful incarceration: Freddie Lee Pitts and Wilbert Lee,⁵ Jesse Hill,⁶ Frank Lee Smith,⁷ and Wilton Dedge.⁸

¹ Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. Article X, section 13 of the State Constitution allows the state to waive its immunity through an enactment of general law. In 1973, the Legislature enacted s. 768.28, F.S., which allows individuals to sue the state government, subdivisions of the state, and municipalities under circumstances where a private person would be liable to the claimant. Florida courts have recognized two exceptions to the state's waiver of sovereign immunity: the state is immune from discretionary or planning-level functions (Department of Health and Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988)) and is immune where the government owes a general duty to all citizens but no particular duty to the injured party (Everton v. Willard, 468 So.2d 936 (Fla. 1985)).

² Judges and prosecutors are afforded absolute immunity. Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981), review denied, 411 So.2d 380 (Fla. 1981).

³ Qualified immunity protects public officials from civil damages to the extent that their conduct does not violate established statutory or constitutional rights of which a reasonable person would have known. To establish qualified immunity, the official had to be acting within the scope of his/her discretionary authority and there was a clear violation of established rights. Gentile v. Bauder, 718 So.2d 781 (Fla. 1998).

⁴ Those exonerated based on DNA in Florida include Jerry Frank Townsend, Frank Lee Smith, Wilton Dedge, Luis Diaz, and Allen Crotzer.

⁵ The first of 22 claims bills for Pitts and Lee was filed in 1977. HB 3035 passed in 1998, and directed the Division of Administrative Hearings to determine whether a cause for equitable relief existed, and if so, to award the claimants \$500,000 each plus attorney's fees and costs not to exceed \$250,000. The claimants were ultimately awarded the maximum allowable. The two claimants had been convicted of murder and sentenced to death for the murders of two Port St. Joe men in 1963. These convictions were ultimately overturned, partly on the grounds that there was a knowing or negligent withholding of evidence by the state, and the claimants were again convicted and sentenced to death in a new trial. In 1973, the United States Supreme Court determined that the death penalty was unconstitutional, and overturned Pitts' and Lee's death sentence at which time they began serving a sentence of life imprisonment. In 1975, after serving 12 years for murder, Governor Askew and the Cabinet granted a pardon, concluding that "substantial doubt exists as to the guilt of Pitts and Lee." Division of Administrative Hearings, Final Report in Case No 98-2005, June 30, 1998.

⁶ Jesse Hill was arrested for violating his probation for failure to report to his probation officer. Five days after his arrest it was discovered that his original probation did not require him to report, so he was released. During his incarceration a pre-existing injury to his spine was aggravated, and he sued for false imprisonment. The jury determined that the Department of Corrections was liable, and assigned 75% of the liability to the Department and 25% to Hill; damages were assessed at \$750,000. Due to legal arguments regarding the assignment of comparative fault in intentional tort cases, the claim bill was filed twice: in 1989 and again in 1996. Ultimately SB 1218 (1996) passed and awarded Jesse Hill \$250,000.

⁷ Claim bills for \$3.5 million were filed in 2001 and 2002: SB 292/HB 1483 (2001 – both bills died in committee) and SB 80 (2002-withdrawn by sponsor). Frank Lee Smith spent 14 years on death row and died there, of cancer. Based on DNA evidence, he was

Twenty one states and the Federal Government provide some sort of compensation to the wrongfully incarcerated; thirty states don't provide any mechanism for compensation. The states that provide monetary compensation for the wrongfully convicted do so at a wide range of levels and formulas, ranging from a low of \$20,000⁹ to a high of \$1 million.¹⁰ There are states that award compensation for each day of incarceration;¹¹ New Jersey allows twice the amount of the claimant's income in the year prior to incarceration or \$20,000 per year of incarceration (whichever is greater)¹²; and Virginia ties the award to 90% of the Virginia per capita personal income as reported by the Economic Analysis of the U.S. Department of Commerce, for up to 20 years.¹³

Similarly, the states require different governmental bodies to determine compensation. Ten states and the Federal Government require compensation decisions be made by the judicial branch,¹⁴ as does the new Louisiana law.¹⁵ The Legislatures in several states make the appropriation;¹⁶ some after having received a recommendation from a separate body.¹⁷ Lastly, there are states that have an independent board make the compensation decision.¹⁸

This bill creates a process by which a wrongfully incarcerated person who is actually innocent could apply for compensation and benefits.

exonerated of the 1985 rape and murder of an eight year-old girl, eleven months after his death. DNA also identified the true perpetrator, Eddie Lee Mosley, also implicated in the case of Jerry Frank Townsend (A mentally retarded man convicted of six murders and one rape; DNA exonerated him and implicated Eddie Lee Mosley. Townsend has not filed a claim bill, but is proceeding against the Broward County Sheriff's Office and the City of Miami in court.)

⁸ Mr. Dedge served 22 years in prison for sexual battery, aggravated battery, and burglary. Based on DNA, he was exonerated. A Petition for Expungement of Record, Factual Findings and other Relief Including Actions for Declaratory Relief and Damages and Equitable Relief under Extraordinary Writ Authority was filed with the Eighteenth Judicial Circuit Court in and for Brevard County, Florida in June, 2005, case no's. 82-135-CF-A and 05-20-05-CA-007583 and subsequently transferred to the Second Judicial Circuit. The petition was dismissed by the court on August 29, 2005. He was awarded \$2 million, had tuition waived, and was offered an official apology by the Legislature during the 2005B Special Session of the Florida Legislature. See ch. 2005-354, L.O.F.

⁹ New Hampshire (NH Stat. s. 541-B:14).

¹⁰ Tennessee (Tenn. Code s. 9-8-108).

¹¹ California (\$100 per day); Iowa (\$50 per day, up to \$25,000 per year).

¹² NJ Stat. 52:4C-1 to 4C-6.

¹³ Virginia Code ss. 8.01-195.10 & 19.2-327.1.

¹⁴ Washington D.C., Illinois, Iowa, Maine, Massachusetts, New Jersey, New York, Ohio, Oklahoma, and West Virginia. Note that in the Federal Government and in four of these states, Illinois, New York, Ohio, and West Virginia, the decision is made by a court of claims, which is typically an administrative court.

¹⁵ Louisiana Act 486 (2005).

¹⁶ Montana and Virginia.

¹⁷ Alabama requires verification by the Division of Risk Management, and recommendation by the committee on Compensation for Wrongful Incarceration; California requires a recommendation from the State Board of Control.

¹⁸ Maryland Board of Public Works (comprised of the Governor, the Comptroller, and the Treasurer); New Hampshire Board of Claims (comprised of two appointees of the Governor; one House member; one Senate member; and a Chair appointed by the Chief Justice of the Supreme Court); North Carolina Industrial Commission (administers the Worker's Comp. Act under the Department of Commerce); Tennessee Board of Claims (Commission within the Treasurer's office); and Wisconsin Claims Board (aligned with the Department of Administration and comprised of a representative of the Governor, a representative of the Secretary of Administration, a representative of the Department of Justice, and chairs of both House and Senate finance committees).

ELIGIBILITY

The bill provides that in order to be eligible for relief, a person who has been wrongfully convicted of a felony must be actually innocent. 'Actually innocent' is defined by the bill to mean:

- the claimant was charged, by indictment or information, with the commission of an offense classified as a felony;
- the claimant was convicted of the offense;
- the claimant was sentenced to incarceration for a term of imprisonment as a result of the conviction;
- the claimant was imprisoned solely on the basis of the conviction for the offense;
- the claimant's acts did not constitute a crime; and
- a court of competent jurisdiction found by clear and convincing evidence that the claimant was actually innocent and issued an order vacating, dismissing, or reversing the conviction and sentence and providing that no further proceedings can be or will be held against the claimant on any facts and circumstances alleged in the proceedings which had resulted in the conviction.¹⁹

Further, the bill provides that a claimant is not eligible for compensation if the claimant:

- pled guilty or nolo contendere to, or was convicted of, regardless of adjudication, a felony prior to the payment of a claim pursuant to this Act, not including the wrongful incarceration for which compensation is being sought pursuant to this Act; or
- submits the claim to the Department of Legal Affairs more than two years after the order vacating, reversing, or dismissing the sentence.²⁰

PROCESS

The bill requires the claimant to submit to the Department of Legal Affairs (the Department) a complete application package, proving eligibility for compensation. The package must include a certified copy of the judgment and sentence in the case, including fingerprints; a set of fingerprints prepared by the sheriff in the county in which the claimant resides within 6 months before filing the claim; a recent photograph; a certified copy of the order vacating, dismissing, or reversing the conviction; a record from the Department of Corrections showing the actual dates of incarceration and a photograph of the person taken by the Department of Corrections; and a brief, sworn statement reciting the facts upon which the claim is based, showing that the claimant is actually innocent and in compliance with all requirements of the act.

Upon receiving the application, the Department is required to examine the application within 30 days and notify the applicant of any apparent errors or omissions and request any additional information that the Department is allowed by law to require. A claim shall not be denied for failure to provide a complete application unless the Department timely notified the applicant within the 30 day period. The Department must process the application within 90 days. If the Department determines that the claim is supported by sufficient proof, the Department must forward a request for payment to the Chief Financial Officer for payment.

¹⁹ Eleven other states and the federal government require innocence to be found by a court: Alabama (Al. Stat. s. 29-2-150 – 165); Washington D.C., Iowa, Massachusetts, Montana (MT Code s. 53-1-214), New York (NY Ct. of Claims Act s. 8b), Ohio, Oklahoma, Texas (Tex. Code ss. 103.001-103.052), Virginia, and West Virginia. Eleven states also allow compensation for a person who was pardoned for innocence.

²⁰ A majority of the other states with wrongful conviction compensation statutes include a 2-year time limit for filing the claim.

The Chief Financial Officer (CFO) is required to pay the claim within a reasonable time after receiving the recommendation from the Department, but not to exceed 90 days. Payment is made pursuant to specific appropriation from the Legislature. Before payment is tendered, the CFO must receive positive proof of identity of the claimant and an executed release and waiver on behalf of the claimant or his or her heirs, successors, and/or assigns forever releasing any state agency or employee from any and all present or future claims arising out of the factual situation in connection with the conviction for which compensation is awarded.

The bill provides that the sole avenue for redress of any dispute regarding any part of the act is through filing of a legislative claim bill.

RELIEF

The bill provides that a claimant that is wrongfully incarcerated and actually innocent, and who meets the requirement of the act shall be paid \$50,000 for each year of wrongful incarceration, prorated as necessary to compensate for portions of years. For sums that exceed \$500,000, payments shall be made in equal annual installments prorated over 10 years. Any person who receives prorated payments and who subsequently pleads guilty or nolo contendere to, or is convicted of, regardless of adjudication, a felony shall immediately forfeit any unpaid amounts or benefits, which shall revert to the state's General Revenue Fund.

It has been argued that a model system of compensation would include not only financial compensation, but also holistic benefits that address the financial, educational, and health problems inherent in spending years in prison.²¹ In Florida, 25% of the inmates housed in the Department of Corrections were enrolled in education programs in fiscal year 2003-2004,²² and only 4.6% of those inmates received their GED.²³ In recognition of the need for educational benefits, the bill also waives tuition and fees for any claimant compensated by the act, for up to 120 hours of instruction at any career center, community college, or state university as defined by the bill.²⁴ The claimant is required to meet and maintain the regular admission requirements of, and be registered at, such educational institution and to make satisfactory academic progress as defined by the educational institution.

Lastly, the Legislature is authorized to issue an official apology on behalf of the State.

MISCELLANEOUS PROVISIONS

The bill provides that the Legislature shall not be deemed by the act or payment of any claim to have waived any defense of sovereign immunity or to have increased the limits of liability on behalf of the state or any person or entity subject to the provisions of s. 768.28, F.S.²⁵

The bill provides that any amount awarded by the act is intended to provide the sole compensation for any and all present and future claims in connection with the wrongful incarceration, and that no further award for attorney's fees, lobbying fees, costs, or other similar expenses shall be made by the state.

²¹ Shawn Armbrust, "When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted", 41 Am.Crim.L. Rev. 157, Winter 2004, p.5.

²² Office of Program Policy Analysis and Government Accountability (OPPAGA), report on Department of Corrections Inmate Programs, last updated 10/13/04.

²³ Id.

²⁴ Three other states offer educational benefits to the wrongfully incarcerated: Louisiana, Montana, and Virginia.

²⁵ Section 768.28, F.S., is the legislative enactment which waives the state's immunity and provides a cap on collectability of \$100,000 per person/\$200,000 per incident. Amounts in excess of the caps may be paid by the Legislature through the claim bill process.

The “whereas” clauses in the bill recognize that the justice system is imperfect and that the Constitution does not guarantee a perfect trial;²⁶ acknowledge that the state’s system of justice infrequently yields imperfect results that can have tragic consequences; evinces that the act is based on a moral desire to acknowledge the actually innocent, and not on a recognition of a constitutional right or violation; and intends that any compensation made be the sole compensation to be provided by the state.

B. SECTION DIRECTORY:

Section 1 provides a definition of “actually innocent”, eligibility criteria, process for submission and payment of claims, requires specified waiver of state liability, provides for compensation and educational benefits, and legislative intent regarding the compensation of the wrongfully incarcerated.

Section 2 provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

It is expected that there will be very few people who are actually innocent and have been wrongfully incarcerated. There are three men who have been recently exonerated who have not been compensated, though it is unknown whether each would meet the stringent requirements provided in the act.²⁷

It is expected that any additional workload on the Department of Legal Affairs or on the Chief Financial Officer would be minimal.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

²⁶ United States v. Hasting, 461 U.S. 499, 509 (1983).

²⁷ Luis Diaz was incarcerated 25 years, Allen Crotzer was incarcerated 24 years, and Jerry Frank Townsend was incarcerated 22 years.

Of the states that do provide compensation to the wrongfully convicted, experience dictates that the number of people actually compensated is relatively small. West Virginia has paid only two claims between 1987 and 1999.²⁸ Information provided by the State of New York (which has no sovereign immunity, and is considered to have a liberal compensation statute), shows that between 1985 and February of 2005, there have been 12 successful claims for unjust conviction and imprisonment, which claimants have been awarded a total of \$5,484,218.43. An additional twenty claims have been settled in New York, totaling \$10,689,250. The largest individual claim was a settlement of \$3.3 million for a man that was wrongfully convicted of murder and spent 14 years in prison.²⁹

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to expend funds, does not reduce the authority of counties and municipalities to raise total aggregate revenues, and does not reduce the total aggregate percentage of a state tax shared with counties and municipalities.

2. Other:

Sovereign Immunity: Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 which allows the state to waive its immunity through an enactment of general law. Sovereign immunity extends to all subdivisions of the state, including counties, municipalities, and school boards. In 1973, the Florida Legislature enacted s. 768.28, F.S. This section allows individuals to sue state government, subdivisions of the state, and municipalities. According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of the state..."

Notwithstanding the enactment of s. 768.28, F.S., certain remnants of sovereign immunity remain in effect:

- a. Monetary limits on recovery: Section 768.28, F.S., imposes a \$100,000/\$200,000 limit on the government's liability. These limits do not preclude judgments in excess of the recovery cap, but do require Legislative approval for awards in excess of the cap.³⁰
- b. Sovereign immunity protections still apply to discretionary functions³¹ and for public duties.³²

²⁸ Tough Luck for the Innocent Man, Michael Higgins, 85 A.B.A.J. 46, 49 (Mar. 1999).

²⁹ Anthony Faison was convicted of murder in 1987 based on eyewitness testimony that was ultimately retracted. <http://www.justicedenied.org/freeat.htm>. (Last visited 8/1/05.)

³⁰ Section 768.28(5), F.S. Note that a governmental entity may pay judgments or settlements up to the limits of insurance coverage without legislative approval. Government entities are not required to purchase insurance.

³¹ Where the state is involved in a discretionary or planning-level function, courts have refused to find liability. The courts use a four-part test to determine whether a particular activity should be classified as discretionary. Department of Health and Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988).

³² Where the government owes a general duty to all citizens, but no particular duty to the injured party, sovereign immunity remains in effect. Everton v. Willard, 468 So.2d 936 (Fla. 1985).

Sovereign immunity does not protect the state for the following actions:

- Taking of property;³³
- Civil rights actions;³⁴
- Breach of contract;³⁵
- Counterclaims against the state.³⁶

The doctrine of sovereign immunity clearly provides protection for the government against tort liability. As a matter of equity, the Legislature has the authority to compensate individuals who have been injured by governmental negligence, without waiving sovereign immunity, through the claim bill process.³⁷ The bill explicitly provides that the Legislature shall not be deemed by the act nor by payment of any claim to have waived any defense of sovereign immunity nor increased the limits of liability on behalf of the state or any person subject to the provisions of s. 768.28, F.S., or any other law. The whereas clauses also clearly state that the act is not a recognition of a constitutional right or violation, for which sovereign immunity would not protect the state.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 28, 2006, the Claims Committee adopted a strike-all amendment and one amendment to the strike-all amendment which made the following changes to the pcb:

- Modifies the definition of “actual innocence” by deleting the prohibition against claimants who have pled guilty or brought about their own prosecution;
- Requires a court to find that the claimant is actually innocent;
- Provides that persons who pled guilty or nolo contendere, or who were convicted of a felony prior to payment, not including the wrongful incarceration for which compensation is being sought pursuant to the act, are ineligible for compensation;
- Requires the Department of Legal Affairs to notify the applicant of errors or omissions in the application within 30 days of receipt;
- Modifies the Department of Legal Affairs’ duties such that the Department makes a request for payment rather than a recommendation;
- Extends the prorated payments from 5 years to 10 years;
- Deletes the requirement that the claimant present positive proof of identification to the Chief Financial Officer; and
- Provides legislative intent that appropriated amounts shall be from recurring funds.

This analysis is drawn to the bill as amended.

³³ State Road Department v. Tharp, 1 So.2d 868 (Fla. 1941).

³⁴ Howlett by and Through Howlett v. Rose, 496 U.S. 356 (1990) and s. 760.07, F.S.

³⁵ Pan-Am Tobacco Corp. v. State Department of Corrections, 471 So.2d 4 (Fla. 1984), rehearing denied (July 1, 1985).

³⁶ Section 768.14, F.S.

³⁷ See s. 768.28(5), F.S., Rule 5.6 of the Rules of the Florida House of Representatives (2004-2006), and Rule 4.81 of the Rules of the Florida Senate (2004-2006).