

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1025 Compensation for Wrongful Incarceration

**SPONSOR(S):** Safety & Security Council; Bogdanoff

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 756 (compare)

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Safety &amp; Security Council</u>	<u>11 Y, 4 N, As CS</u>	<u>Birtman/Davis</u>	<u>Havlicak</u>
2) <u>Policy &amp; Budget Council</u>	<u></u>	<u>Leznoff</u>	<u>Hansen</u>
3) <u></u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

This bill creates the "Victims of Wrongful Incarceration Compensation Act", and provides compensation and benefits to wrongfully incarcerated persons. The bill provides that a person must be actually innocent in order to be eligible for compensation or benefits, and that a person is not eligible if the person was a convicted felon prior to the wrongful incarceration, or if the person submits their application more than 6 months after the court determines the wrongful incarceration. Findings regarding eligibility and the amount of compensation are to be made by the court using criteria provided in the bill. The Department of Financial Services and the Chief Financial Officer are authorized to disburse amounts as provided in the judicial findings.

The bill provides compensation at the rate of \$50,000 per year of wrongful incarceration pro-rated for portions of years, not to exceed a maximum award of \$1.5 million, and provides that determinations made in future years will adjust the rate of compensation to reflect the annual consumer price index. Claimants are also eligible for waiver of fees and tuition for up to 120 hours of instruction at specified educational institutions. The bill also authorizes the appointment of a public defender to assist the claimant with the expunction of the claimant's criminal record. Government entities are prohibited from imposing any fees for the expunction of records.

As a condition of the award, the claimant must release and forever waive any governmental entity from any and all present or future claims arising from the factual situation giving rise to the relief provided under this act.

The bill prohibits attorneys from receiving fees in excess of 25% of the total award, or \$1,000, whichever is greater, and allows payment for reasonable costs.

While the bill does not provide a specific appropriation, the bill creates an entitlement for qualifying individuals. Therefore the fiscal impact is indeterminate but potentially significant should specific appropriations be made consistent with this act. The bill contains a non-specific appropriation which has drafting issues requiring resolution.

The bill has an effective date of July 1, 2008.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

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**DATE:** 3/14/2008

# 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.

### 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 immunity<sup>1</sup>, absolute immunity<sup>2</sup>, and qualified immunity<sup>3</sup>. Thus, there are individuals who have been incarcerated for crimes that they did not commit with no avenue for compensation. Nationwide, 213 people have been exonerated or released from incarceration since 1989 based on post conviction DNA testing.<sup>4</sup> In recent history, nine people in Florida have been exonerated based on DNA.<sup>5</sup> In the past 10 years, seven claimants have petitioned the Legislature for compensation for wrongful incarceration: Freddie Lee Pitts and Wilbert Lee,<sup>6</sup> Jesse Hill,<sup>7</sup> Frank Lee Smith,<sup>8</sup> Wilton Dedge,<sup>9</sup> Alan Crotzer,<sup>10</sup> and Luis Diaz.<sup>11</sup>

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<sup>1</sup> 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)).

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

<sup>3</sup> 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).

<sup>4</sup> Innocence Project at <http://www.innocenceproject.org/index.php> (last visited March 3, 2008).

<sup>5</sup> Those exonerated based on DNA in Florida include Jerry Frank Townsend, Frank Lee Smith, Wilton Dedge, Luis Diaz, Allen Crotzer, Orlando Boquete, Cody Davis, Larry Bostic, and Chad Heins.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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 exonerated of the 1985 rape and murder of an eight year-old girl, eleven months after his death. DNA also identified the true

The federal government, the District of Columbia, and at least 22 states expressly authorize compensation for wrongful incarceration by statute.<sup>12</sup> 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 \$20,000<sup>13</sup> to a high of \$1 million.<sup>14</sup> There are states that award compensation for each day of incarceration;<sup>15</sup> 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)<sup>16</sup>; 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.<sup>17</sup>

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,<sup>18</sup> as does the new Louisiana law.<sup>19</sup> The Legislatures in several states make the appropriation;<sup>20</sup> some after having received a recommendation from a separate body.<sup>21</sup> Lastly, there are states that have an independent board make the compensation decision.<sup>22</sup>

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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.)

<sup>9</sup> 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.

<sup>10</sup> This year, two bills have been filed for the relief of Alan Crotzer. See Senate Bill 12 and House Bill 1. Alan Crotzer spent nearly 24 years in prison for being wrongfully convicted of a July 1981 robbery and two rapes in Tampa, Florida. Judgment and sentence against Mr. Crotzer was vacated by a Hillsborough Circuit Court in January of 2006 based in part on DNA evidence. In the 2007 legislative session, HB 125 passed the full House and would have provided compensation to Mr. Crotzer. The bill died in the Senate.

<sup>11</sup> Luis Diaz was convicted of eight rapes in 1980, and was pegged as the "Bird Road Rapist." He served 25 years before being released on August 3, 2005 based on his conviction being vacated after two victims recanted their identifications and DNA evidence in two of the cases. He currently has a lawsuit pending in the United States District Court in the Southern District, Miami Division (see case # 07-20914-CIV-Lenard/Torres) alleging multiple civil rights violations as well as state tort law claims. Two claim bills have been filed for the 2008 legislative session: SB 58 and HB 409.

<sup>12</sup> See 28 U.S.C. s. 2513; ALA. CODE s. 29-2-150 *et seq.*; CAL. PENAL CODE s. 4900 *et seq.*; D.C. CODE ANN. s. 2-421 *et seq.*; 705 ILL. COMP. STAT. 505/8; LA. REV. STAT. ANN. s. 15:572.8; IOWA CODE s. 663A.1; ME. REV. STAT. ANN. title 14, s. 8241; MD. CODE ANN., STATE FIN. & PROC. s. 10-501; MASS. GEN. LAWS ch. 258D, s. 1 *et seq.*; N.H. REV. STAT. ANN. s. 541-B:14; N.J. STAT. ANN. s. 52:4C-1 *et seq.*; N.Y. CT. CL. ACT s. 8-b; N.C. GEN. STAT. s. 148-82 *et seq.*; OHIO REV. CODE ANN. s. 2743.48; OKLA. STAT. title 51, s. 154; TENN. CODE ANN. s. 9-8-108; TEX. CIV. PRAC. & REM. CODE ANN. s. 103.001 *et seq.*; W. VA. CODE s. 14-2-13a; and WIS. STAT. s. 775.05.

<sup>13</sup> New Hampshire (NH Stat. s. 541-B:14).

<sup>14</sup> Tennessee (Tenn. Code s. 9-8-108).

<sup>15</sup> California (\$100 per day); Iowa (\$50 per day, up to \$25,000 per year).

<sup>16</sup> NJ Stat. 52:4C-1 to 4C-6.

<sup>17</sup> Virginia Code ss. 8.01-195.11 & 19.2-327.1.

<sup>18</sup> 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.

<sup>19</sup> Louisiana Act 486 (2005).

<sup>20</sup> Montana and Virginia.

<sup>21</sup> 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.

<sup>22</sup> 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).

Most recently, the Legislature provided compensation to Wilton Dedge, who was wrongfully incarcerated for 22 years.<sup>23</sup> The Dedge Act provided that \$2 million be paid to the Chief Financial Officer, and authorized the Chief Financial Officer to execute a qualified assignment to an insurer which entered into a structured settlement with Mr. Dedge. The act also waived tuition and fees at state educational institutions. The act required a release and waiver of all present and future claims against the state; provided legislative intent that the award is intended to provide compensation for any and all present and future claims, that no further award would be made by the state, that the defense of sovereign immunity is not waived by the act, that the act is not a recognition of a constitutional right but rather a moral obligation; and made an apology on behalf of the state.

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

## **COMPENSATION and BENEFITS**

The bill provides that a person who is determined to be wrongfully incarcerated pursuant to the act, is entitled to \$50,000 for each year of wrongful incarceration, prorated as necessary to account for portions of years, not to exceed \$1.5 million. In making a judicial finding regarding the amount of compensation, the bill requires the court to consider the following factors: the claimant's earning capacity; the claimant's need for alcohol and/or drug counseling; the claimant's need for health insurance; and the claimant's need for housing. The bill authorizes the court to determine whether the compensation shall be payable to the claimant in one lump sum, through the purchase of an annuity, or any combination thereof. For determinations made after 2008, the bill requires the court to adjust the annual rate and maximum amount for inflation using the Consumer Price Index starting in 2008.

In addition to compensation, an applicant would also be eligible for a waiver of tuition and fees for up to 120 hours of instruction at any Florida career center, community college, or state university as long as the person meets and maintains regular admission requirements, remains registered at such institution, and makes satisfactory academic progress as defined by the academic institution.

## **ELIGIBILITY**

The bill provides that a claimant is eligible for compensation if :

- The claimant was wrongfully convicted of a felony offense and incarcerated in a prison with the Florida Department of Corrections;
- The conviction and sentence have been vacated, dismissed, or reversed by a court of competent jurisdiction;
- No further proceedings can or will be held against the claimant on any facts and circumstances alleged in the proceedings which resulted in the conviction;
- The claimant petitions the court for a finding of eligibility and amount of compensation no more than 6 months after the order vacating, reversing, or dismissing the sentence;
- The claimant has no other suits pending in state or federal court requesting compensation arising out of the factual situation in connection with the conviction for which compensation is being sought under this Act;
- The claimant has not been found guilty of any felony offenses other than the wrongful conviction, and has no felony offenses pending;

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<sup>23</sup> See ch. 2005-354, LOF.

- A claim bill has not been filed relating to the wrongful conviction; and
- The court has made a finding by clear and convincing evidence that the claimant is actually innocent. “Actually innocent” is defined by the bill as:
  - The claimant’s act did not constitute a crime;
  - The claimant did not commit the offense that resulted in his or her conviction and incarceration;
  - The claimant did not aid, abet, or act as an accomplice or accessory to a person who committed the offense that resulted in his or her conviction and incarceration.

## **PROCEDURE**

The bill requires persons desirous of compensation to petition the same court that issued the order vacating, reversing, or dismissing the claimant’s conviction and sentence within 6 months of the issuance of said order, to determine whether the claimant is eligible for compensation pursuant to the Act and if so, the amount of compensation.<sup>24</sup>

The court is required to consider the following factors: the claimant’s earning capacity; the claimant’s need for drug and/or alcohol counseling; the claimant’s need for mental health counseling; the claimant’s need for health insurance; and the claimant’s need for housing. The court is prohibited from making any finding regarding fault, liability, or damages.

Separate findings are to be made by the court regarding attorney’s fees and reasonable costs. The court may not award attorney’s fees that exceed a total of 25% of the court’s finding regarding the amount of compensation to the claimant, or \$1000, whichever is greater.

The bill provides that findings by the court are not appealable; if the claimant chooses not to accept the court’s findings their sole recourse is the filing of a claim bill in accordance with the current Rules of the House of Representatives and the Rules of the Senate.

No later than 10 days from receiving the court’s findings regarding the amount of compensation, the Chief Financial Officer is required to request release of funds pursuant to chapter 216. Upon release of the funds by the Legislative Budget Commission, the Department of Financial Services is required to pay the amounts as determined by the court within 90 days after the appropriation has become effective. There is no provision however, delineating under what mechanism specific funds are appropriated subject to release by the Legislative Budget Commission. The Department of Financial Services is given the authority to execute all necessary agreements to implement this Act.

## **SOURCE OF FUNDS**

The bill appropriates recurring General Revenue to the Department of Financial Services in sufficient amount to make payments as required by the bill. The Department is required to request release of

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<sup>24</sup> 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.

funds pursuant to chapter 216, F.S.<sup>25</sup> It is unclear how such appropriation could be effected, given its lack of specificity.

## **EXPUNGEMENT OF RECORDS**

The courts maintain sole discretion to determine whether, and how, to seal or expunge court records without interference from legislative requirements.<sup>26</sup> Any court of competent jurisdiction may order a criminal justice agency to expunge a criminal history record of a minor or adult who complies with the statutory procedure.<sup>27</sup> Section 943.0585, F.S., requires that the person must apply for and receive a certificate of eligibility for expunction from the Florida Department of Legal Affairs. The Department is required to issue a certificate if:

- the person has submitted a certified statement from the state attorney that an indictment, information, or other charging document was not filed in the case;
- an indictment, information, or charging document was filed, it was dismissed or nolle prosequi, and that none of the charges resulted in a trial;
- the criminal history record does not relate to a violation of specified statutes, where the defendant was found guilty of, or pled guilty or nolo contendere without regard to whether adjudication was withheld;<sup>28</sup>
- the person has never been adjudicated guilty of a criminal offense or been adjudicated delinquent for committing specified statutory crimes as a minor;
- the person has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains;
- the person has never secured a prior sealing or expunction of a criminal history record;
- the person is no longer under court supervision applicable to the criminal activity to which the expunction pertains.

A person petitioning for an expunction must remit a \$75 processing fee to the Department of Law Enforcement for placement in the Department of Law Enforcement Operating Trust Fund, unless such fee is waived by the executive director.<sup>29</sup>

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<sup>25</sup> Section 216.192, F.S., provides for release of appropriations and revision of budgets.

<sup>26</sup> *State v. D.H.W.*, 686 So.2d 1331, 1334 (Fla. 1996).

<sup>27</sup> Section 943.0585, F.S.

<sup>28</sup> Section 943.0585, F.S., prohibits the expungement of records relating to the following violations: s. 393.135, F.S., relating to sexual misconduct with the developmentally disabled; s. 394.4593, F.S., relating to sexual misconduct in the mental health setting; s. 787.025, F.S., relating to luring or enticing a child; chapter 794, F.S., relating to sexual battery; s. 796.03, F.S., relating to procuring a person under the age of 18 for prostitution; s. 800.04, F.S., lewd or lascivious acts on or in the presence of a person less than 16; s. 810.14, F.S., relating to voyeurism; s. 817.034, F.S., relating to communications fraud; s. 825.1025, F.S., relating to lewd or lascivious activity on or in the presence of an elderly person; s. 827.071, F.S., relating to sexual performance by a child; chapter 839, F.S., relating to offenses by public officers and employees; s. 847.0133, F.S., relating to transmitting obscene materials to minors; s. 847.0135, F.S., relating to computer pornography; s. 847.0145, F.S., relating to selling or buying of minors; s. 893.135, F.S., relating to trafficking; s. 916.1075, F.S., relating to sexual misconduct with the mentally deficient; s. 907.041, F.S., a statutory list of dangerous crimes that preclude a person from being given pretrial release with nonmonetary conditions; any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, F.S.

<sup>29</sup> Section 943.0585(2)(b), F.S.

Any criminal history record which is ordered expunged by a court of competent jurisdiction is required to be physically destroyed or obliterated by any criminal justice agency having custody of such record, except that the criminal history record in the custody of the Department of Law Enforcement must be retained.<sup>30</sup> A criminal justice agency may retain a notation indicating compliance with an order to expunge.<sup>31</sup> The law allows a person who is the subject of an expunged criminal history record to lawfully deny or fail to acknowledge arrests covered by the expunged record, with specified exceptions,<sup>32</sup> and may not be held for perjury for failure to recite or acknowledge an expunged criminal record. In regard to the official records of the court, the court clerk is required to remove from the official records of the court, excepting the court file, all entries and records subject to the order and seal the records together with the court file and retain same in a non-public index, subject to further order of the court.<sup>33</sup>

Non-judicial arrest records can be expunged administratively by the Department of Law Enforcement when the arrest was made contrary to law or by mistake.<sup>34</sup> Administrative expunction requires an application, a supporting endorsement signed by the head of the arresting agency and on agency letterhead, and an affidavit executed by the chief of the arresting law enforcement agency, sheriff, or department head verifying that he or she has reviewed the record of the arrest and that the arrest was contrary to law or was a mistake.<sup>35</sup>

This bill allows a claimant who is compensated pursuant to this Act to have a public defender appointed to assist with the judicial and administrative expunction of non-judicial criminal records arising from the wrongful conviction, notwithstanding any provision of s. 943.0585, F.S. The bill also provides that a government entity may not impose a fee for the implementation of any part of the expungement provisions of the bill.

## MISCELLANEOUS PROVISIONS

The bill requires a claimant to sign a release and waiver prior to receiving a state warrant, on behalf of the claimant, heirs, successors, and assigns, forever releasing the state or any agency, instrumentality, or political subdivision thereof, from all present or future claims that such persons may have against such entities arising out of the factual situation in connection with the conviction for which compensation is sought.

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<sup>30</sup> Section 943.0585(4)(a), F.S., which provides that expunged criminal history records retained by the Department of Law Enforcement are confidential and exempt from the public records provisions, and not available to any person or entity except upon order of a court of competent jurisdiction.

<sup>31</sup> Section 943.0585(4)(a), F.S.

<sup>32</sup> Section 943.0585(4)(a), F.S., does not allow a person who is the subject of an expunged criminal history record to deny or fail to acknowledge arrests if the subject is a candidate for employment with a criminal justice agency; is a defendant in a criminal prosecution; concurrently or subsequently petitions for sealing of records; is a candidate for admission to The Florida Bar; is seeking to be employed or licensed by or to contract with the Department of Children and Family Services or the Department of Juvenile Justice in a position having direct contact with children, the developmentally disabled, the aged, or the elderly; is seeking to be employed or licensed by the Department of Education, any district school board, university laboratory school, charter school, private or parochial school, or any governmental entity that licenses child care facilities; or is seeking employment with a Florida seaport.

<sup>33</sup> Rule 3.692, Fla. R. Crim. P.

<sup>34</sup> Section 943.0581, F.S.

<sup>35</sup> Rule 11C-7.008, F.A.C.

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.<sup>36</sup>

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.

The "whereas" clauses in the bill recognize that the justice system is imperfect and that the Constitution does not guarantee a perfect trial,<sup>37</sup> 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; provides that the compensation is intended to acknowledge the fact that the claimant suffered significant damages resulting from physical restraint and the deprivation of freedom; and intends that any compensation made be the sole compensation provided by the state.

#### C. SECTION DIRECTORY:

Section 1: Provides that the act be titled, "Victims of Wrongful Incarceration Compensation Act."

Section 2. Provides eligibility criteria.

Section 3. Provides for a judicial finding of eligibility and amount of compensation, and findings as to attorney's fees.

Section 4. Provides duties of the Department of Financial Services and the Chief Financial Officer.

Section 5. Provides for a release and waiver.

Section 6. Provides educational benefits.

Section 7. Provides for the expungement of records.

Sections 8 and 9. Provides for legislative intent.

Section 10. Provides an effective date of July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not have any impact on state revenues.

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<sup>36</sup> 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.

<sup>37</sup> *United States v. Hasting*, 461 U.S. 499, 509 (1983).



2. Expenditures:  
Indeterminate. See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:  
The bill does not appear to have any impact on local revenues.
2. Expenditures:  
The bill does not appear to have any impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill provides that a person who is determined to be wrongfully incarcerated pursuant to the act is entitled to compensation and benefits in four specific areas: monetary compensation, a waiver of tuition/fees at specified career or academic institutions, attorney's fees and reasonable costs, and waiver of fees for expunction of records and appointment of a public defender to assist with same.

It is expected that there will be very few people who are eligible pursuant to the act. There are seven men who have been recently exonerated who have not been compensated, though it appears that none would meet the requirements provided in the act.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

Regarding monetary compensation, the fiscal impact on state expenditures is indeterminate, but potentially significant. Compensation will vary based on years of wrongful incarceration, but could exceed \$1.5 million per individual.

The Department of Education provided the following information regarding the average cost per credit hour, regarding the waiver of tuition and fees:

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<sup>38</sup> Luis Diaz was incarcerated 25 years, and has a suit pending in federal court; Allen Crotzer was incarcerated 24 years, and had a juvenile conviction prior to his wrongful conviction; Jerry Frank Townsend was incarcerated 22 years and has a suit pending; Orlando Boquete escaped while wrongfully incarcerated and is not seeking compensation; Chad Heins has an indictment pending against him; Larry Bostick has multiple prior convictions.

<sup>39</sup> "Tough Luck for the Innocent Man," Michael Higgins, 85 A.B.A.J. 46, 49 (Mar. 1999).

<sup>40</sup> Anthony Faizon was convicted of murder in 1987 based on eyewitness testimony that was ultimately retracted.

<http://www.justicedenied.org/freet.htm>. (Last visited 4/11/07.)

YEAR	State Universities	Community Colleges	Technical Centers
2002-03	\$89.70	\$52.36	\$1.59
2003-04	\$95.83	\$56.14	\$1.63
2004-05	\$102.12	\$59.11	\$1.72
2005-06	\$107.49	\$63.67	\$1.83
2006-07	\$110.83	\$67.26	\$1.87

The cost per credit hour above includes tuition and fees that are charged to all students such as the fee for health, activity, & services; athletic fee; access/transportation fee; building fee; capital improvement fee; financial aid fee; and technology fee.

Regarding expunction of records, the Department of Law Enforcement has stated that the provisions of this bill would not have a fiscal impact on their operations. The workload of the public defender may be affected slightly, due to the requirement to represent the claimant in having their records expunged.

The bill also provides for the payment of attorney's fees, which may not exceed 25% of the amount awarded or \$1000, whichever is greater. The maximum amount of attorney's fees awarded in 2008 could not exceed \$375,000. However, because the rate of compensation made in future years may be indexed to the CPI, future awards may be greater. Additionally, the bill allows for attorneys to be awarded their "reasonable costs." The amount of costs will vary on a case-by-case basis, and could be significant.

The bill may also impact the court system, which is directed to make several findings in the bill. The Office of the State Court Administrator has been asked to submit fiscal comments on the strike-all amendment, which comments have not yet been received.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

## 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..."

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

- i. Taking of property;<sup>41</sup>
- ii. Civil rights actions;<sup>42</sup>
- iii. Breach of contract;<sup>43</sup>
- iv. Counterclaims against the state.<sup>44</sup>

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.<sup>45</sup> Should a court find that wrongful incarceration is akin to a taking of one's liberty, and thus a constitutional violation, sovereign immunity would not protect the state.

### **Separation of Powers and Unlawful Delegation**

Article II, Section 3 of the Florida Constitution provides that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The separation of powers doctrine prevents the Legislature from delegating its constitutional duties. In reviewing the constitutionality of legislative policy making, the Florida Supreme Court has acknowledged that "where the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the doctrine."<sup>46</sup> In short, the Legislature must give an agency adequate guidelines to carry out the law to ensure that the agency does not become the "lawgiver rather than the administrator."<sup>47</sup>

This bill creates three duties: determining eligibility for compensation and appropriating funds. While the determination of eligibility for compensation is typically made by the Legislature when considering claim bills based on negligence, this bill delegates the determination of eligibility to the courts, and provides criteria for making the eligibility decision. The Department of Financial Services

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<sup>41</sup> *State Road Department v. Tharp*, 1 So.2d 868 (Fla. 1941).

<sup>42</sup> *Howlett by and Through Howlett v. Rose*, 496 U.S. 356 (1990) and s. 760.07, F.S.

<sup>43</sup> *Pan-Am Tobacco Corp. v. State Department of Corrections*, 471 So.2d 4 (Fla. 1984), rehearing denied (July 1, 1985).

<sup>44</sup> Section 768.14, F.S.

<sup>45</sup> See s. 768.28(5), F.S., Rule 5.6 of the Rules of the Florida House of Representatives (2006-2008), and Rule 4.81 of the Rules of the Florida Senate (2006-2008).

<sup>46</sup> *Askew v. Cross Key Waterways*, 372 So.2d 913, 921 (Fla. 1978).

<sup>47</sup> *Id* at 925.

and the Chief Financial Officer are given clear direction regarding paying the award based on the court's findings. The bill maintains the Legislature's unique and sole authority to make appropriations.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The bill provides for a non specific appropriation in subsection 5 of section 4 of the bill. The ability to implement this provision is questionable absent specific appropriation from the legislature.

**D. STATEMENT OF THE SPONSOR**

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 12, 2008, the Safety & Security Council adopted a strike-all amendment by Rep. Bogdanoff and an amendment to the strike-all by Rep. Hukill. The substance of the two amendments generally makes the following changes:

- Adds a requirement that the person be "actually innocent" and provide a definition thereof;
- Requires that the determination regarding eligibility, the amount of compensation, and the amount of attorney's fees be made by the court that issued the order vacating, reversing, or dismissing the underlying conviction within 6 months of the issuance of said order;
- Requires the court to consider the claimant's employment, health, and counseling needs;
- Authorizes the court to determine whether the claimant should be paid in a lump sum, through an annuity, or by a combination;
- Removes provisions requiring annuity payments to revert to the state if the claimant is convicted of a future felony;
- Provides language authorizing the Department of Financial Services to request funds and make payments as required by the bill;
- Allows for the appointment of a public defender to assist the claimant in having non-judicial criminal records expunged;
- Prohibits government entities from imposing any fees for expungement of records;
- Removes provisions authorizing the claimant to sue the government if he or she rejects the offer to settle;
- Provides legislative intent that payment should not be considered a waiver of sovereign immunity or an increase in the limit of the state's liability;
- Provides legislative intent that the payment is intended to provide sole compensation; and
- Provides 'whereas' clauses providing that payment reflects a moral obligation and not a recognition of a constitutional right.

This analysis is drafted to the bill as amended.