

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1025 Compensation for Wrongful Incarceration

SPONSOR(S): Bogdanoff

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Safety & Security Council</u>	_____	<u>Birtman</u>	<u>Havlicak</u>
2) <u>Policy & Budget Council</u>	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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 is not eligible for compensation or benefits if the person was a convicted felon prior to the wrongful incarceration, or if the person submits their application more than 2 years after the court determines the wrongful incarceration. Eligibility is to be determined by the Chief Financial Officer using guidelines and processes provided in the bill. Payments stop upon any future felony conviction.

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 indexes the rate of compensation to 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, reimbursement for specified psychological counseling services, and reimbursement for specified health insurance premiums. The bill also waives fees for judicial and administrative expunction, and requires the Department of Legal Affairs and the Department of Law Enforcement to assist with the expunction of the claimant’s criminal record.

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 and lobbyists from receiving fees in excess of 25% of the total award, or \$1,000, whichever is greater.

While the bill does not provide an appropriation, the bill has an indeterminate and potentially significant impact on state expenditures.

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: 3/3/2008

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.

Promote personal responsibility – The bill provides that unpaid compensation 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. Nationwide, 213 people have been exonerated or released from incarceration since 1989 based on post conviction DNA testing.⁴ In recent history, nine people in Florida have been exonerated based on DNA.⁵ In the past 10 years, seven claimants have petitioned the Legislature for compensation for wrongful incarceration: Freddie Lee Pitts and Wilbert Lee,⁶ Jesse Hill,⁷ Frank Lee Smith,⁸ Wilton Dedge,⁹ Alan Crotzer,¹⁰ and Luis Diaz.¹¹

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

⁵ 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.

⁶ 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.

⁷ 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

The federal government, the District of Columbia, and at least 22 states expressly authorize compensation for wrongful incarceration by statute.¹² 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 \$20,000¹³ to a high of \$1 million.¹⁴ There are states that award compensation for each day of incarceration;¹⁵ 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)¹⁶; 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.¹⁷

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

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.

⁸ 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 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.)

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ New Hampshire (NH Stat. s. 541-B:14).

¹⁴ Tennessee (Tenn. Code s. 9-8-108).

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

¹⁶ NJ Stat. 52:4C-1 to 4C-6.

¹⁷ Virginia Code ss. 8.01-195.11 & 19.2-327.1.

¹⁸ 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.

¹⁹ Louisiana Act 486 (2005).

²⁰ Montana and Virginia.

²¹ 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.

²² 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

Most recently, the Legislature provided compensation to Wilton Dedge, who was wrongfully incarcerated for 22 years.²³ 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 and benefits.

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. The bill requires the annual rate to be indexed to the annual consumer price index or similar inflation indicator.

The bill further requires the Department of Financial Services to purchase an annuity on behalf of the petitioner for a term of not less than 10 years.²⁴ The terms of the annuity must provide that the annuity will not be sold, discounted, or used as security for a loan or mortgage by the applicant, must contain beneficiary provisions for the continued disbursement of the annuity in the event of the death of the applicant; and must provide that the payment reverts to the state in the event that the applicant is convicted of a felony after receipt of an award.

In addition to the annuity, 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.

A wrongfully incarcerated person could also be reimbursed, pursuant to the bill, for up to a maximum of 52 hours of psychological counseling services by a licensed psychologist or psychiatrist; and for health insurance premiums for up to 5 years after cessation of incarceration if the claimant is not employed, or is employed but health insurance is not provided by his or her employer.

ELIGIBILITY

The bill provides that a person is eligible for compensation if they are wrongfully incarcerated, which is defined as:

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).

²³ See ch. 2005-354, LOF.

²⁴ Note that the amount is taxable unless the award is considered a qualified assignment of liability to make periodic payments as damages on account of physical injury or sickness pursuant to section 130(c) of Title 26 of the Internal Revenue Code. Section 130(c) of Title 26 of the Internal Revenue Code provides that amounts received for agreeing to a qualified assignment shall not be included in gross income. A qualified assignment is an assignment of a liability to make periodic payments as damages on account of personal injury of sickness if the assignee assumes the liability from a party to the agreement and periodic payments are fixed and determinable; such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient; the assignee's obligation is no greater than the obligation of the person who assigned the liability; and the compensation is provided on account of personal physical injuries or physical sickness.

- A person whose felony conviction and sentence have been vacated by a court of competent jurisdiction; and
- With respect to whom the court has made a finding by clear and convincing evidence that he or she:
 - Did not commit the offense that resulted in the conviction and incarceration; and
 - Did not aid, abet, or act as an accomplice or accessory to a person who committed the offense that resulted in the conviction and incarceration.

A person may petition the court for a determination of whether he or she is a wrongfully incarcerated person if such person was not subsequently convicted of the same offense or any lesser included offense for which the previous sentence and conviction were vacated, who currently has no charges pending related to the wrongful conviction, and against whom no further criminal proceedings can or will be initiated. The prosecuting authority must be given reasonable, written notice that the person intends to petition the court for such a finding. In order to be eligible for compensation, the order vacating the conviction must include a finding of wrongful incarceration and set forth details upon which that finding is based.²⁵

Further, the bill provides that a claimant is not eligible for compensation if the claimant submits the claim to the Department of Financial Services more than two years after a court determines the person's wrongful incarceration.²⁶

Lastly, a person would not be eligible for compensation if prior to the wrongful incarceration, the person was a convicted felon.²⁷ If the person is convicted of a felony after being awarded compensation, the bill provides that any further annuity payments will revert to the state. The bill also requires that the Attorney General and the applicant must immediately report any felony conviction to the issuer of the annuity.

PROCEDURE

The bill requires persons desirous of compensation to apply to the Chief Financial Officer for compensation and benefits. The bill provides that the application must include a certified copy of the order finding the person to be a wrongfully incarcerated person; certified copies of the original judgment and sentence; documentation demonstrating the length of the sentence served; positive proof of identification (including current fingerprints and photo identification); all documentation maintained by the Department of Law Enforcement related to the person's criminal history or record; and any other documentation or evidence required by rules adopted by the Department of Financial Services.

The Department of Financial Services is required to process and review the completed application within 90 days of receipt. Within the first 30 days, the bill requires the Department to notify the claimant of any errors or omissions and request any additional information. The application cannot be denied for failure to correct an error or omission, or to submit additional information unless the required notice was submitted within the 30-day period. The department is required to notify the claimant of a

²⁵ 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.

²⁶ A majority of the other states with wrongful conviction compensation statutes include a 2-year time limit for filing the claim.

²⁷ Note that this provision is commonly referred to as “the clean hands” requirement.

determination that the claim meets the requirement of the act within 5 days of making such determination.

The bill requires the Chief Financial Officer to draw and issue a state warrant for the entire amount of the claim within 30 days of the notice that the claim meets the requirements of the act.

SOURCE OF FUNDS

The bill requires the Chief Financial Officer to issue the state warrant from the General Revenue Fund or any other available funds.

The bill also requires that the amount awarded is subject to specific appropriation made by a separate budget request in addition to the legislative budget request of the Department of Financial Services.

Note that the bill does NOT contain an appropriation.

EXPUNGEMENT OF RECORDS

The courts maintain sole discretion to determine whether, and how, to seal or expunge court records without interference from legislative requirements.²⁸ 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.²⁹ 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;³⁰
- the person has never been adjudicated guilty of a criminal offense or been adjudicated delinquent for committing specified statutory crimes as a minor;

²⁸ State v. D.H.W., 686 So.2d 1331, 1334 (Fla. 1996).

²⁹ Section 943.0585, F.S.

³⁰ 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.

- 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.³¹

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.³² A criminal justice agency may retain a notation indicating compliance with an order to expunge.³³ 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,³⁴ 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.³⁵

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.³⁶ 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.³⁷

This bill requires the Department of Legal Affairs and the Department of Law Enforcement to take all action necessary to judicially and administratively expunge the claimant's criminal record arising from a wrongful arrest, wrongful conviction, and wrongful incarceration, notwithstanding any provision of s. 943.0585, F.S. The bill also provides that fees for the expunction process shall be waived.

³¹ Section 943.0585(2)(b), F.S.

³² 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.

³³ Section 943.0585(4)(a), F.S.

³⁴ 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.

³⁵ Rule 3.692, Fla. R. Crim. P.

³⁶ Section 943.0581, F.S.

³⁷ Rule 11C-7.008, F.A.C.

MISCELLANEOUS PROVISIONS

The bill limits attorneys, advocates, lobbyists, or any other entity acting in a similar capacity from receiving compensation in excess of 25% of the total award under this act, or \$1,000, whichever is greater, for providing assistance to, representing, or acting on behalf of a wrongfully accused person. The bill does not provide a limit on attorneys and lobbyists receiving costs.

The bill also provides that if an applicant rejects the offer to settle his or her claim, the applicant may file suit against the state pursuant to s. 768.28, F.S.³⁸

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.

C. SECTION DIRECTORY:

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

Section 2. Provides definitions and eligibility criteria.

Section 3. Provides for compensation and benefits.

Section 4. Provides for the application process.

Section 5. Provides the Department of Financial Services with rule-making authority.

Section 6. Provides limitations on attorney's and lobbyist's fees.

Section 7. Allows the claimant to file suit against the state if the claimant rejects an offer to settle.

Section 8. 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.

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.

³⁸ Section 768.28, F.S., provides that the state waives its immunity in tort, but amounts over the statutory caps of \$100,000 per person and \$200,000 per incident may not be collected without further act of the Legislature.

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, reimbursement for psychological counseling services, and reimbursement of health insurance premiums.

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.³⁹

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 1999.⁴⁰ 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.⁴¹

Regarding monetary compensation, counseling services and health insurance premiums, 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. It is unknown what the costs associated with counseling and insurance premiums might be. Furthermore, the Department of Financial Services (DFS) has noted there is no money to pay these reimbursements if the "total amount awarded" or "the entire amount of the claim" has already been paid out of a sum certain – via lump sum warrant or annuity.

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

YEAR	State Universities	Community Colleges	Technical Centers
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³⁹ 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.

⁴⁰ "Tough Luck for the Innocent Man," Michael Higgins, 85 A.B.A.J. 46, 49 (Mar. 1999).

⁴¹ 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.)

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.

The Department of Law Enforcement has stated that the provisions of this bill would not have a fiscal impact on their operations; the Department of Legal Affairs has not provided a fiscal impact. The DFS, however, has reported that to implement their responsibilities under this bill, it will require 3 FTE and approximately \$200,000 of recurring General Revenue.

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;⁴²
- ii. Civil rights actions;⁴³
- iii. Breach of contract;⁴⁴
- iv. Counterclaims against the state.⁴⁵

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.⁴⁶ 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.

The bill also allows an applicant who rejects an offer to settle his or her claim for compensation pursuant to this chapter to file suit against the state in the circuit court in which the applicant was convicted pursuant to s. 768.28, F.S. Query whether this would expand the state's tort liability by waiving existing sovereign immunity for claims of wrongful incarceration.

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."⁴⁷ 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."⁴⁸

This bill creates two 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 Department of Financial Services, and provides guidelines and procedures for making the eligibility decision. Several of the provisions of the bill give unclear or contradictory guidance to the Department of Financial Services, and thus may raise unconstitutional delegation issues (see Drafting Comments below). The bill maintains the Legislature's unique and sole authority to make appropriations.

B. RULE-MAKING AUTHORITY:

The bill gives the Department of Financial Services, on behalf of the Chief Financial Officer, authority to adopt rules regarding the forms and procedures related to applications for compensation under this act. The Department notes that the rulemaking authority should be mandatory, rather than optional, and expressed concern that the substance of the bill allows the Department to require documentation,

⁴² *State Road Department v. Tharp*, 1 So.2d 868 (Fla. 1941).

⁴³ *Howlett by and Through Howlett v. Rose*, 496 U.S. 356 (1990) and s. 760.07, F.S.

⁴⁴ *Pan-Am Tobacco Corp. v. State Department of Corrections*, 471 So.2d 4 (Fla. 1984), rehearing denied (July 1, 1985).

⁴⁵ Section 768.14, F.S.

⁴⁶ 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).

⁴⁷ *Askew v. Cross Key Waterways*, 372 So.2d 913, 921 (Fla. 1978).

⁴⁸ *Id* at 925.

evidence, or information as required by rule but the language authorizing the Department to adopt rules does not contemplate rules regarding documentation, evidence, or information.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. FDLE recommends that the term 'incarceration' not include time spent in a county jail awaiting trial. (Lines 39-49).
2. It is unclear whether the bill is meant to include juveniles adjudicated delinquent in its eligibility requirements. (Lines 39-49).
3. Regarding eligibility, the bill requires a finding that no further criminal proceedings can or will be brought against the claimant. That requirement should likely be qualified to provide that no further proceedings shall be brought 'with respect to the charges for which the previous sentence and conviction were vacated.' (Lines 61-63).
4. Regarding eligibility, the bill requires that there can be no charges pending relating to the charges for which the previous sentence and conviction were vacated. What if other charges are pending? Consider removing the qualification here. (Lines 59-61).
5. It appears that indexing the maximum total compensation to the consumer price index would allow the amount paid to exceed the cap of \$1.5 million. It is unclear how the Chief Financial Officer would/ could purchase an annuity based on an amount that would change over time. (Lines 76-79).
6. Allowing the rate of compensation to be indexed to the annual consumer price index or similar inflation indicator may not give the Chief Financial Officer adequate guidance on which indicator to use. Consider instead the following: shall be adjusted annually by the percentage change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1982-84+100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics. (Line 78).
7. It is not clear who should make the separate budget request required. (Line 81).
8. It appears that the annuity payments would be taxable income to the claimant, unless tied to a structured settlement agreement and paid for physical injury, as it was done in the act that compensated Wilton Dedge.⁴⁹ (Lines 84-86).
9. The bill requires the Attorney General to notify the issuer of the annuity if the applicant is convicted of a felony after he or she has received an award. The Attorney General does not have access to such information. Consider whether the Chief Financial Officer should instead be required to do a background check of the applicant every year prior to the annuity payment being issued, and notify the issuer if the payment needs to revert to the state. (Lines 93-103).
10. Should the payments stop for conviction of a felony in another state? This would require the CFO to request a national background check. (Lines 93-103).
11. What if the later conviction had adjudication withheld, or was later reversed on a technicality? (Lines 93-103).
12. The bill requires reimbursement for psychological counseling and health insurance premiums by the Chief Financial Officer, who has no mechanism or process for paying such claims. Query whether counseling and health insurance premiums could be covered by the claimant by an initial lump-sum payment, or be paid from their annuity payments? (Lines 114-120).

⁴⁹ See ch. 2005-354, LOF.

13. It is unclear whether the health insurance premium reimbursement is available to a claimant who is employed but cannot afford the health insurance provided by his or her employer. (Lines 117-120).
14. The bill provides for ineligibility if 'prior to his or her wrongful conviction and incarceration, the person was a convicted felon.' Query whether this would (or should) include felony convictions during incarceration. (Lines 127-128).
15. FDLE recommends that the provision requiring 'the claimant to provide to DFS all documentation maintained by FDLE related to the person's criminal history or criminal record' be stricken and replaced with language requiring the person to submit two full sets of fingerprints administered by a law enforcement agency, one of which shall be forwarded by the CFO to FDLE for statewide background checks and to the FBI for national criminal records checks. Cost to be absorbed by FDLE; results submitted to DFS. (Lines 147-149).
16. The bill requires the Chief Financial Officer to issue a state warrant within 30 days of a determination that the claimant meets the requirements of the act, and also requires that the amount be awarded subject to specific appropriation made by separate budget request. It is unclear whether such request could be made and approved within 30 days. (Lines 80-83 and 170 – 174).
17. DFS notes that the bill does not direct DFS what to do in the event that the application does not meet the requirements of the act. Query whether the application process would be subject to the Administrative Procedures Act, and thus subject to a hearing if the application is denied. (Lines 164-169).
18. The bill requires the Chief Financial Officer to purchase an annuity, and also requires that she draw and issue a state warrant, which is to be received by the claimant. These two provisions appear to be incongruous. (Lines 84-87 and 170-175).
19. The bill requires the claimant to sign a release and waiver prior to receiving a state warrant. Query whether the release should be signed prior to execution of annuity documents, as the claimant won't be receiving a state warrant. (Lines 175-184).
20. The bill requires the Department of Legal Affairs and the Department of Law Enforcement to take all action necessary to judicially and administratively expunge the claimant's criminal record. It would appear that requiring either department to petition the court on behalf of the claimant may pose a conflict, and could be better accomplished by the claimant and his or her attorneys. (Lines 185 – 193).
21. Consider qualifying the records to be expunged to non-judicial records as the Legislature cannot require the court to expunge its own records. (Lines 185-193).
22. If a person's records are expunged, the only way to prove that the conviction was reversed would be by court order pursuant to s. 943.0585, F.S. Consider removing this section, and replacing it with a provision that waives the fees should a person want to have their record expunged. (Lines 185-193).
23. The bill limits attorney's and lobbyist's fees to 25% of the total award (or \$1000, whichever is greater). It is unclear if, how, and when to value the benefits awarded in addition to the monetary compensation (i.e., waiver of tuition, reimbursement of psychologist, reimbursement for health insurance premiums). (Line 201).

24. DFS notes that the limitation on attorney's fees is tied to representation of a "wrongfully accused person", which term is not defined in the bill. Presumably a wrongfully accused person would not be entitled to compensation. Consider changing this term to "wrongfully incarcerated." (Lines 203-204).
25. The bill allows the claimant to file suit if he or she rejects the offer to settle. Nothing in the bill provides for an offer to settle. (Lines 205-210).
26. The bill does not include a statement that payment should not be considered a waiver of sovereign immunity or an increase in the limits of the state's liability.
27. The bill does not include a statement that payment is intended to provide sole compensation for any and all present and future claims arising out of the factual situation in connection with the wrongful incarceration.

It is expected that the sponsor will be filing a strike-all amendment that addresses the issues enumerated above.

E. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES