



\$50,000 per year of imprisonment (adjusted for inflation beginning January 1, 2009) up to a \$2 million limit, plus a tuition waiver. Additionally, the person is entitled to automatic administrative expunction of his or her criminal record associated with the wrongful conviction.

This bill creates unnumbered sections of the Florida Statutes.

## II. Present Situation:

Nationwide, between 1989, when the first DNA exoneration occurred, and 2003, there were 340 confirmed DNA exonerations in the United States.<sup>1</sup> The number of exonerations based on DNA evidence continues to consistently rise.<sup>2</sup> In Florida, at least nine people have been exonerated or released from incarceration since 2000, as a result of post-conviction DNA testing.<sup>3</sup>

### Potential Causes of Action for Wrongful Incarceration

A person who has been exonerated or acquitted has little chance of receiving compensation for the loss of his or her liberty.<sup>4</sup> This is especially true when the conviction was not caused by government misconduct. Unlike some other states, Florida does not have a statute expressly authorizing compensation for wrongful incarceration. Many theories seeking redress for wrongful incarceration have been advanced by, and on behalf of, those wrongfully incarcerated. Such theories include: federal civil rights actions, civil actions against judges and prosecutors, suits against the state for a taking of liberty, suits against a crime victim or witness, malpractice actions against defense attorneys, and claim bills. Problems exist with each theory which limit the chances of successfully obtaining compensation.

### Civil Rights

A cause of action for violations of a wrongfully incarcerated person's civil rights may provide compensation to some wrongfully incarcerated persons.<sup>5</sup> Such civil rights violations include malicious prosecution, extraction of an involuntary confession, suppressed evidence, or a lack of probable cause for an arrest or a search.<sup>6</sup> However, only a small percentage of wrongful incarcerations result from civil rights violations.<sup>7</sup> Additionally, the police, prosecution, and judiciary are often immune from civil rights lawsuits.<sup>8</sup>

---

<sup>1</sup> Lauren C. Boucher, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1069-70 (Spring 2007).

<sup>2</sup> *Id.*

<sup>3</sup> Frank Lee Smith, Jerry Townsend, Wilton Dedge, Luis Diaz, Alan Crotzer, Orlando Boquete, Larry Bostic, Chad Heins, and Cody Davis are nine persons who have been exonerated or released from incarceration in this state based on DNA testing. Florida Innocence Project, <http://www.floridainnocence.org/cases.html> (last visited on March 16, 2008).

<sup>4</sup> See *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997).

<sup>5</sup> 42 U.S.C. s. 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

<sup>6</sup> Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 691 (Spring 2002).

<sup>7</sup> Ashley H. Wisneski, *'That's Just Not Right: Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88

A pending civil rights lawsuit was filed by Jerry Frank Townsend. Mr. Townsend is the second person exonerated by DNA evidence while serving a sentence in Florida. The defendants are Broward County sheriff's officers.<sup>9</sup> The lawsuit alleges, among other things, that the officers coerced Mr. Townsend, a mentally retarded person, into making false confessions to several rape-murders. The officers allegedly started and stopped a tape recorder as they coached Mr. Townsend on his confessions.<sup>10</sup> After serving 22 years in prison, Mr. Townsend was released from prison.

### ***Civil Actions Against Judges and Prosecutors***

Civil suits against judges and prosecutors for wrongful incarceration are unlikely to be successful. Judges have judicial immunity for their judicial acts within their jurisdiction "no matter how unfair, injurious or inappropriate."<sup>11</sup> Prosecutors are also protected by judicial immunity.<sup>12</sup>

### ***Taking of Liberty***

In 2005, Wilton Dedge pursued a novel approach to obtain compensation for his wrongful incarceration. In a lawsuit against the state, Mr. Dedge alleged in part that the state took a constitutionally protected liberty interest from him.<sup>13</sup> The trial court dismissed the lawsuit on the grounds that the suit was barred by the doctrine of sovereign immunity.<sup>14</sup> Further, the court stated that "only the Legislature can address the issue of compensation under existing law."<sup>15</sup> The court's ruling was subsequently appealed, but the appeal was dismissed for technical reasons.<sup>15</sup> Similarly, case law suggests that the takings clause of the U.S. Constitution does not apply to a deprivation of liberty.<sup>16</sup>

### ***Civil Actions Against Victims and Witnesses***

Civil actions against a crime victim or witness for testimony that led to a wrongful conviction, generally, will not be successful.<sup>17</sup>

Parties, witnesses and counsel are accorded absolute immunity as to civil liability with regard to what is said or written in the course of a lawsuit, providing the statements are relevant to the litigation. The reason for the rule is that although it may bar recovery for bona fide injuries, the chilling effect on free testimony and

---

MASS. L. REV. 138, 147 (Winter 2004).

<sup>8</sup> Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 87 (1999).

<sup>9</sup> See Third Amended Complaint, *Townsend v. Jenne et al.*, (Fla. 17th Cir. Ct. May 19, 2004).

<sup>10</sup> *Id.*

<sup>11</sup> *Kalmanson v. Lockett*, 848 So. 2d 374, 379 (Fla. 5th DCA 2003).

<sup>12</sup> *Office of the State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097 (Fla. 1993).

<sup>13</sup> *Dedge v. Crosby*, Case No. 2005-CA-001807 (Fla. 2d Cir. Ct. 2005). For more information on the takings argument, see Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97 (2004).

<sup>14</sup> Order Granting Amended Motion to Dismiss, *Dedge v. Crosby* (Fla. 2d Cir. Ct. August 29, 2005).

<sup>15</sup> *Dedge v. Crosby*, 2005 WL 3159616 (Fla. 1st DCA 2005).

<sup>16</sup> See *Jones v. Philadelphia Police Department*, 57 Fed. Appx. 939 (3d Cir. 2003); *Hurtado v. United States*, 410 U.S. 578 (1973).

<sup>17</sup> See *Stucchio v. Tinchler*, 726 So. 2d 372 (Fla. 5th DCA 1999).

access to the courts if such suits were allowed would severely hamper our adversary system.<sup>18</sup>

Under the federal civil rights laws, crime victims and witnesses are immune from liability for statements unless malice is involved.<sup>19</sup>

### ***Malpractice by Defense Attorney***

Public defenders and criminal defense attorneys may be liable for the wrongful incarceration of a client through malpractice actions. To prevail in a malpractice action, the client must prove malpractice and actual innocence.<sup>20</sup> Damages, however, against a public defender are limited under s. 768.28, F.S., to \$100,000 per claim and \$200,000 per occurrence.

### ***Claim Bills***

A claim bill, sometimes called a relief act in Florida, is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.<sup>21</sup> Legal commentators have noted that claim bills often are not a simple or effective remedy for compensating wrongfully incarcerated persons.<sup>22</sup> The discretionary nature of claim bills precludes these bills from effectively providing relief to those wrongfully incarcerated.<sup>23</sup> The success of a claim bill may be driven by political connections and the political climate of the day, rather than the true merits of the claim.<sup>24</sup> Moreover, the process can be lengthy, and the outcome is rather uncertain.<sup>25</sup> In Florida, claim bills have previously been used in some cases by the state to compensate wrongfully incarcerated persons.

### **Compensation for Wrongful Incarceration in Florida**

The Florida Legislature has previously compensated persons for wrongful incarceration. Some of the laws authorizing the compensation are discussed below.

- Under ch. 2005-354, L.O.F., the Legislature appropriated \$2,000,000 to purchase an annuity to compensate Wilton Dedge. DNA tests proved that Mr. Dedge did not commit the rape for which he was convicted after he served more than 22 years in prison.
- Under ch. 98-431, L.O.F., the Legislature created a process by which an administrative law judge would determine whether the trial at which Freddie Pitts and Wilbert Lee were imprisoned for murder was fundamentally unfair. If the trial was judged to be unfair, they were to be awarded \$1,250,000. Mr. Pitts and Mr. Lee were imprisoned for 12 years until they were pardoned in 1975 by the Governor.

---

<sup>18</sup> *Id.* at 374 (quoting *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. 5th DCA 1984)).

<sup>19</sup> *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992).

<sup>20</sup> *Schreiber v. Rowe*, 814 So. 2d 396, 399 (Fla. 2002).

<sup>21</sup> Florida Senate, Committee on Judiciary, *Compensation for Wrongful Incarceration*, Interim Project Report 2006-140, at 4 (December 2005).

<sup>22</sup> Boucher, *supra* note 1, at 1096.

<sup>23</sup> *Id.*

<sup>24</sup> Bernhard, *supra* note 8, at 94.

<sup>25</sup> *Id.*

- Under ch. 96-438, L.O.F., the Legislature appropriated \$250,000 to Jesse Hill for injuries and damages suffered as the result of his false arrest and imprisonment. A jury verdict, which was partially satisfied, ordered the Department of Corrections to pay Mr. Hill \$750,000. Mr. Hill was imprisoned for seven and one-half days without cause. The conditions of Mr. Hill's imprisonment aggravated an existing neck injury.
- Under ch. 95-468, L.O.F., the Legislature directed the City of Fort Lauderdale to pay \$85,000 to Tyler Fontaine. Mr. Fontaine had been unlawfully arrested, incarcerated, prosecuted, and ultimately acquitted. Mr. Fontaine had already recovered \$100,000 of a \$150,000 jury verdict in his favor from the City of Fort Lauderdale.
- Under ch. 92-253, L.O.F., the Legislature ordered the State Attorney for the Nineteenth Judicial Circuit to pay \$150,000 to Edith and Lewis Crosley to compensate them for losses incurred in the criminal defense of their son. Todd Neely, the Crosley's son, was convicted on the basis of evidence suppressed by the state. After four and one-half years, the Office of the State Attorney for the Nineteenth Judicial Circuit dismissed the charges against Todd Neely, concluding he was innocent.
- Under ch. 76-309, L.O.F., the Legislature paid \$15,000 to Michael Burbank to compensate him for lost wages, mental anguish, and deep hurt he suffered while wrongfully deprived of his freedom. Mr. Burbank had been sentenced to 20 years in prison for armed robbery of a convenience store. Mr. Burbank was exonerated after nine months in prison.
- Under ch. 74-404, L.O.F., the Legislature paid \$75,000 to Jesse Daniels as compensation for lost earnings, mental anguish, and other injuries he suffered while wrongfully imprisoned for 14 years in the Florida State Hospital. Mr. Daniels was "charged with the crime of rape . . . in spite of the statement of the alleged victim that she had been raped by a husky Negro man and not by Jesse Daniels, who was at that time a 19-year-old, slightly built white boy . . . ."

In 1929, under ch. 14541-(No. 59), the Legislature appropriated \$2,492 to be paid to J. B. Brown in installments of \$25 per month. Mr. Brown had been pardoned for murder after serving 12 years in prison and had been found innocent by the Legislature.<sup>26</sup>

### **Claim Bills Passed for Alan Crotzer**

Claim bills passed both the House and Senate this Session, providing for an appropriation to compensate Alan J. Crotzer for his wrongful incarceration.<sup>27</sup> Mr. Crotzer spent 24 and one-half years in prison for the wrongful conviction of a July 1981 robbery and two rapes in Tampa. Continuing to maintain his innocence during his imprisonment, in 2003 Mr. Crotzer obtained access to the evidence from trial, which was subjected to DNA testing. The last round of testing

<sup>26</sup> The story of J. B. Brown was particularly dramatic. For an account of his wrongful conviction and subsequent exoneration, see Bernhard, *supra* note 8, at 76-77 (footnotes omitted).

<sup>27</sup> SB 12 (2008); HB 1 (2008). Alan J. Crotzer may be also known as *Allen J. Crotzer* in the criminal pleading of his case. In the 2007 Legislative Session, a claim bill for Mr. Crotzer passed the full house, but the Senate bill died in the Senate Committee on The Special Master on Claim Bills. *See* CS/CS/HB 125 (2007); SB 50 (2007).

confirmed Mr. Crotzer could not have been the person who raped the victims. Judgment and sentence against Mr. Crotzer were vacated by a Hillsborough Circuit Court in January 2006, based in part on the DNA evidence.<sup>28</sup>

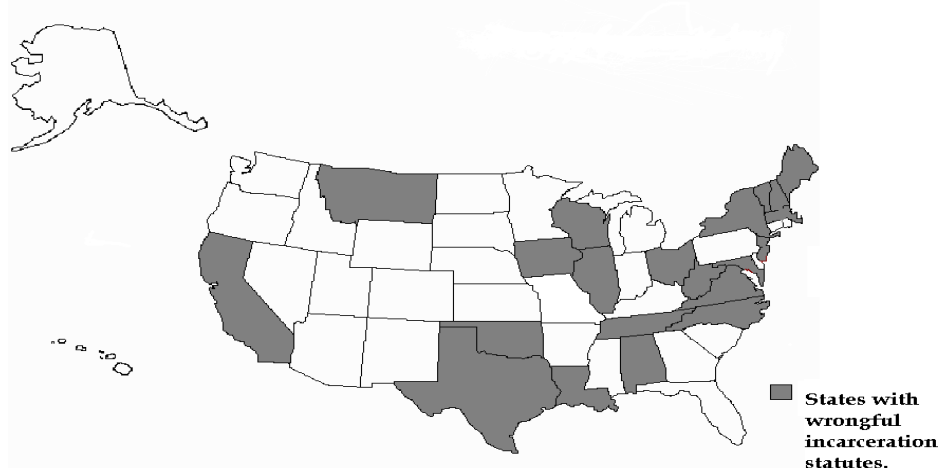
### **Pending Claim Bills for Luis Diaz**

Claim bills are also pending in the House and Senate providing for an appropriation to compensate Luis Diaz for his wrongful incarceration.<sup>29</sup> Mr. Diaz was convicted of eight rapes in 1980 in the Coral Gables area. Mr. Diaz was sentenced to multiple life sentences. After two victims recanted their identifications of Mr. Diaz and DNA analyses concluded that evidence from two of the rape kits collected from victims did not match Mr. Diaz, he was released after serving 25 years in prison.

### **Compensation Available in Other Jurisdictions**

The federal government, the District of Columbia, and at least 21 states expressly authorize compensation for wrongful incarceration by statute.<sup>30</sup> See Figure below.

Figure: State Statutes



### ***Eligibility for Compensation***

A review of other state statutes demonstrates that eligibility for compensation is limited to innocent persons. Innocence is determined by either a governor in a pardon, a court, or an administrative body. Pardons triggering eligibility for compensation must either state that the pardon is based on innocence or recite facts showing that the pardon is based on innocence.<sup>31</sup>

<sup>28</sup> An alleged accomplice of Mr. Crotzer who had previously pled guilty to the crime stated that he and his brother committed the crime with a childhood friend, not Mr. Crotzer.

<sup>29</sup> SB 58 (2008); HB 409 (2008). Mr. Diaz has filed a lawsuit in federal court against Miami-Dade County and the police alleging multiple civil rights violations as well as state tort claims.

<sup>30</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.*; MONT. CODE ANN. 53-1-214; 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.*; 13 V.S.A § 5574; VA. CODE ANN. 8.01-195.11; W. VA. CODE s. 14-2-13a; and WIS. STAT. s. 775.05.

<sup>31</sup> See 705 ILL. COMP. STAT. 505/8; MD. CODE ANN., STATE FIN. & PROC. s. 10-501; and TENN. CODE ANN. s. 40-27-109.

Court determinations of innocence are typically made after a hearing on a petition for compensation. Administrative bodies may also hold hearings to determine actual innocence.<sup>32</sup>

#### ***Determination of Compensation Amounts***

The U.S. Court of Federal Claims may award damages to a convicted person later found not guilty by a trial court and innocent by the court of claims.<sup>33</sup> Compensation amounts are determined by the judiciary in most jurisdictions. In the other jurisdictions, compensation amounts are determined by an administrative body.<sup>34</sup> In some cases, legislatures retain some authority over compensation determinations. In Alabama, for example, compensation is determined by the Committee on Compensation for Wrongful Incarceration, which is comprised of several legislators, the Lieutenant Governor, and the Director of Finance.<sup>35</sup> Upon the committee's recommendation, compensation is subject to appropriation by the Legislature.<sup>36</sup> In Wisconsin, the portion of an award in excess of \$25,000 must be approved by the Legislature.<sup>37</sup>

#### ***Compensation Awards***

Compensation awards vary widely in other jurisdictions. The federal government pays wrongfully incarcerated persons sentenced to death up to \$100,000 per year of incarceration and other wrongfully incarcerated persons up to \$50,000 per year of incarceration. In the District of Columbia, Maryland, New York, and West Virginia, awards of compensatory damages are unlimited. California pays a flat rate of \$100 per day. In Tennessee and Texas, awards are capped at \$1,000,000 and \$500,000, respectively, and may include non-economic damages. In New Hampshire, total awards are limited to \$20,000.

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

This bill creates a program under which a person who was convicted and incarcerated for a felony of which he or she was actually innocent may apply for compensation from the state.

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

Upon the order vacating a conviction and sentence becoming final, a defendant may petition the original sentencing court for a determination as to whether he or she qualifies as a "wrongfully incarcerated person."<sup>38</sup> If so, the question becomes whether he or she is eligible for compensation under the program.

A wrongfully incarcerated person is ineligible for compensation under the bill if, prior to his or her wrongful conviction and incarceration, the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication, any felony offense. Delinquency dispositions are not considered to be a disqualifier. The conviction of or plea to a felony during the incarceration resulting from the wrongful conviction will also disqualify a person from receiving

---

<sup>32</sup> See CAL. PENAL CODE s. 4903 and WIS. STAT. s. 775.05.

<sup>33</sup> 28 U.S.C. s. 2513.

<sup>34</sup> See CAL. PENAL CODE s. 4903 and WIS. STAT. s. 775.05.

<sup>35</sup> ALA. CODE s. 29-2-151 *et seq.*

<sup>36</sup> ALA. CODE s. 29-2-165.

<sup>37</sup> WIS. STAT. s. 775.05.

<sup>38</sup> Under the bill, "wrongfully incarcerated person" means that the person's felony conviction and sentence was vacated, and the person did not commit the act nor offense that served as the basis for the conviction and incarceration, nor did he or she aid, abet, or act as an accomplice or accessory to the person who committed the act or offense.

compensation under the bill. If the person is serving a concurrent sentence for another crime at the same time as the offense for which he or she was wrongfully incarcerated, there would be no compensation.

*Finding by the original sentencing Court*

Within 30 days after the order vacating the conviction and sentence becomes final –if that occurs on or after July 1, 2008 - a person must file a sworn petition with the original sentencing court seeking status as a wrongfully incarcerated person who is eligible for compensation. If the order vacating the conviction and sentence became final prior to July 1, 2008, the person has until July 1, 2010 to file. This is the first step in the program set forth in the bill.

The petition must state that verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the evidence. It must also state that the petitioner is not disqualified, for the reasons mentioned above, from seeking compensation.

The prosecuting authority in the underlying felony for which the person was incarcerated must be given a copy of the petition. He or she has 30 days to respond.

The prosecuting authority may respond by either:

1. certifying to the court that no further criminal proceedings in the case can or will take place; that no questions of fact remain as to the petitioner's wrongful incarceration; and that the petitioner is not disqualified from seeking compensation; *or*
2. by contesting the evidence of actual innocence, the related facts, or the petitioner's eligibility for compensation.

If the prosecutor's response is *not to contest the petition*, if the original sentencing court finds by clear and convincing evidence that the petitioner is a wrongfully incarcerated person, based upon the prosecutor's certification, the court shall certify to the Department of Legal Affairs (department) that the petitioner is also eligible for compensation.

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

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

The petitioner must establish, by clear and convincing evidence before an administrative law judge, his or her status as a wrongfully convicted person and eligibility for compensation under the program. The *hearing shall be conducted* no later than 120 days after the petition is transferred from the original sentencing court. The prosecutor shall appear to contest factual matters, or matters related to the nature, significance and effect of the evidence of actual



innocence. The *administrative law judge must enter his or her findings of fact and recommendations* with the original sentencing court *within 45 days* of the hearing's adjournment.

The *original sentencing court* shall consider the order from the administrative law judge and enter its own *order within 60 days*. The court may adopt or decline to adopt the findings of the administrative law judge. *If the court finds the petitioner has met his or her burden of proof* - based upon the administrative law judge's findings and the court's own assessment of the findings and recommendations - the court's own order shall include a *certification to the department that the petitioner is a wrongfully incarcerated person who is eligible for compensation*.

The bill states with specificity that it does not establish any new due process or rights to appeal by creating this program to compensate the wrongfully incarcerated.

### **Compensation for Wrongful Incarceration**

*Within two years of the original sentencing court's order* finding the person to be a wrongfully incarcerated person who is eligible for compensation, the person must initiate an *application for compensation* with the department. The bill sets forth the required documentation and allows the department to adopt rules as necessary to carry out the program created by the bill. After a *review of the application*, if the requirements are met, the department is directed to *notify the Chief Financial Officer* to draw warrants from the General Revenue Fund or another source designated by the Legislature in law to pay the wrongfully incarcerated person. There is a continuing appropriation provided for in the bill. The bill provides time limitations for each step of the review, approval, and payment process. The program provides for payments in installments, based upon the time served by the person.

A person who is found to be a wrongfully incarcerated person is entitled to receive:

- **Monetary compensation in the amount of \$50,000 for each year of wrongful incarceration.** This amount will be prorated as necessary to account for a portion of a year. For those persons found to be wrongfully incarcerated after December 31, 2008, the Chief Financial Officer may adjust the annual rate of compensation for inflation. The cap on payments under this provision is \$2 million.
- **A tuition and fee waiver for up to 120 hours of instruction at any career center, community college, or state university.** The wrongfully incarcerated person must meet and maintain the regular admission requirements and make satisfactory academic progress as defined by the educational institution.

- **Immediate administrative expunction of the criminal record resulting from the wrongful incarceration.**<sup>39</sup> The bill requires the Department of Legal Affairs and the Department of Law Enforcement to take all necessary action to administratively expunge the claimant's criminal record. Additionally, the bill provides that all fees associated with the expunction process shall be waived.
- **Fines, costs, and attorney's fees.** The program reimburses the person for costs and fees associated with the wrongful conviction and incarceration.

It is unclear what remedies are available to a wrongfully incarcerated person in the event the application for compensation is denied. Arguably, a denial of the application by Department of Financial Services (DFS) may constitute final agency action that would provide an applicant with an avenue for review under the Administrative Procedure Act.<sup>40</sup>

Prior to receiving the first payment, the claimant must execute a release and waiver releasing the state or any agency, or any political subdivision, from any and all liability for present and future claims arising out of the factual situation in connection with the wrongfully incarcerated person's wrongful incarceration. The program created by the bill is intended to be the sole redress.

Payments will cease upon a new felony or the death of the wrongfully incarcerated person.

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

The bill includes a statement declaring that any compensation paid under the act does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person subject to the provisions of s. 768.28, F.S. This declaration makes clear that any compensation under the act is not a contingent waiver increasing the limits of liability on behalf of the state.<sup>41</sup>

#### **Effective Date**

The bill takes effect on July 1, 2008.

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

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

None.

<sup>39</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. Section 943.0585, F.S. A person must apply for and receive a certificate of eligibility for expunction from the Department of Legal Affairs and demonstrate satisfaction of several criteria delineated in the statute. *Id.*

<sup>40</sup> The Florida Administrative Procedure Act (APA) provides that a party who is adversely affected by final agency action is entitled to judicial review. Section 120.68(1), F.S. *See Ford v. Agency for Persons with Disabilities Dist. 15, St. Lucie*, 932 So. 2d 294 (Fla. 4th DCA 2005).

<sup>41</sup> For example, the Florida Supreme Court has held that the "purchase of tort liability insurance by a government entity. . .constitutes a waiver of sovereign immunity up to the limits of insurance coverage and that this contingent waiver is independent of the general waiver in section 768.28." *Avallone v. Board of County Com'rs of Citrus County*, 493 So. 2d 1002, 1004-05 (Fla. 1986).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill creates a program to compensate persons who were convicted and incarcerated for a felony for which they were actually innocent in an amount of \$50,000 per year of imprisonment, up to a \$2 million limit, plus a tuition waiver.

C. Government Sector Impact:

The bill specifies that compensation shall be paid from the General Revenue Fund or any other available state funds. The bill includes a continuing appropriation. The bill contemplates that an eligible wrongfully incarcerated person would receive \$50,000 (or a larger amount adjusted for inflation at the discretion of the Chief Financial Officer) for each year of incarceration. The cost for fully funding the compensation program is not known because the amount will depend upon the number of persons who qualify under the bill's criteria and the number of years for which those persons were incarcerated. In Florida, at least nine people have been exonerated or released from incarceration since 2000, as a result of post-conviction DNA testing.<sup>42</sup> However, not all of them may qualify for compensation.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

<sup>42</sup> See note 3, *supra*. Wilton Dedge, one of the nine persons, was compensated by the Legislature under ch. 2005-354, L.O.F. Claim bills to compensate Alan Crotzer passed both the House and Senate this Session.

**VIII. Additional Information:**

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

**CS by Criminal and Civil Justice Appropriations on April 15, 2008:**

The committee substitute provides that a person petitioning the court for a claim of wrongful incarceration must file the petition within 90 days of the order vacating their conviction.

**CS by Criminal Justice on April 8, 2008:**

The committee substitute for the committee substitute:

- Provides a method by which the original sentencing court makes the determination that a person is a wrongfully incarcerated person who is eligible for compensation under the program created by the bill.
- Allows for the original prosecuting authority to either acquiesce to or contest the person's sworn petition stating that verifiable and substantial evidence of actual innocence exists and that he or she is eligible under the criteria set forth in the bill.
- Creates a forum for contested hearings, if necessary, before an administrative law judge who then issues findings of fact and recommendations to the court for a final order.
- Requires that a person be disqualified from compensation under the program if he or she has a prior felony, a felony committed while incarcerated, or a felony following his or her exoneration.
- Provides for an application for compensation to be reviewed by the Department of Legal Services and then approved for payment by the Chief Financial Officer, and provides for annual review of the person's criminal history records to determine if payment should continue.
- Sets forth a continuing appropriation for the payment of compensation to wrongfully incarcerated persons who are entitled to payment.

**CS by Judiciary on March 25, 2008:**

The committee substitute:

- Changes the amount of monetary compensation awarded under the act from \$100,000 per year of incarceration to \$50,000 per year of incarceration, adjusted by the Chief Financial Officer (CFO) for inflation beginning January 1, 2009.
- Requires a wrongfully incarcerated person exonerated prior to the effective date of the bill to file a petition for a determination of whether the person qualifies as a wrongfully incarcerated person by October 1, 2010.
- Clarifies that the automatic expunction of the wrongfully incarcerated person's criminal history applies to administrative criminal records only, and not to administrative *and* judicial records.
- Clarifies that a wrongfully incarcerated person is ineligible for compensation if the person files an application more than two years after the court's determination that the person is a wrongfully incarcerated person.

- Provides a claimant 30 calendar days in which to correct any errors or omissions in the application for compensation, or submit any additional information requested by the CFO.
- Includes a declaration that any payment made under the act does not constitute a waiver of sovereign immunity or an increase in the limits of liability on behalf of the state.

**B. Amendments:**

None.

---

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---