The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL:	CS/SB 326
INTRODUCER:	Judiciary Committee and Senator Thompson
SUBJECT:	Victims of Wrongful Incarceration
DATE:	February 24, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Fav/CS**
2.	Cellon	Cannon	CJ	**Pre-meeting**
3.			AP	
4.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 326 amends the "Victims of Wrongful Incarceration Compensation Act" to make a limited expansion in the type of evidence a claimant may use as proof of eligibility for compensation as a wrongfully incarcerated person. Under the bill, a claimant is "innocent of the offenses charged" and eligible for compensation if:

- The Governor by an executive order appointed a special prosecutor to review the claimant's conviction;
- The special prosecutor entered a nolle prosequi for charges for which the claimant was convicted and sentenced to death; and
- The claimant was convicted and sentenced to death before January 1, 1980.

Under current law, a claimant's eligibility for compensation is established through a court order vacating the claimant's conviction and sentence as the result of exonerating evidence.

A claimant who is eligible for compensation under the criteria in the bill must apply to the Department of Legal Affairs (DLA) for compensation. The same application documents currently required for compensation under the existing criteria are required for a claimant who is eligible for compensation under the bill, except that the certified copy of the nolle prosequi or nolle prosequi memorandum replaces the requirement of the court order vacating conviction and sentence.

Current amounts and forms of compensation, such as monetary compensation, an educational tuition and fee waiver, and the reimbursement of fines, penalties, court costs, and reasonable attorney's fees available to wrongfully incarcerated persons are equally available to wrongfully incarcerated persons qualifying for redress under the bill. Similarly, timelines for the DLA to review an application and related decision-making are the same as in current law.

The bill does not affect the provision of existing law which makes a wrongfully incarcerated person ineligible for compensation as the result of a disqualifying felony conviction.

A claimant seeking compensation under the expanded eligibility criteria in the bill must apply to the DLA by July 1, 2016.

II. Present Situation:

Wrongful Incarceration Act and Postconviction DNA Testing

In 2001 postconviction DNA testing became more widely available in Florida. It was a statutory recognition that the science behind DNA testing was evolving and reliable evidence of identity.[1] In cases where DNA evidence exists at the crime scene, and it is collected and processed properly, DNA has been the evidence that can help solve "cold cases" and provide the basis for exonerating the innocent.

The Florida Legislature established the "Victims of Wrongful Incarceration Compensation Act" (Act) in 2008.[2] The Act defines a wrongfully incarcerated person as:

> a person whose felony conviction and sentence have been vacated by a court of competent jurisdiction and … the original sentencing court has issued its order finding that the person neither committed the act nor the offense that served as the basis for the conviction and incarceration and that the person did not aid, abet, or act as an accomplice or accessory to a person who committed the act or offense.[3]

The impetus for the Act seems to have been the number of exonerations that were occuring in Florida due to DNA evidence showing that people were innocent of committing crimes for which they were incarcerated and the Legislature's interest in compensating these wrongfully incarcerated people.[4]

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[1] *See* Ch. 2001-97, L.O.F.; s. 925.11 and s. 943.3251, F.S.; see also *Sireci v. State*, 773 So.2d 34 (Fla. 2000) noting that "DNA typing was recognized in this state as a valid test as early as 1988." It should be noted, however, that in crimes that occurred long before DNA testing was admitted in evidence by the courts, physical evidence from a crime scene was likely collected and processed much differently than it is now because there was no expectation that such scientific evidence existed.

[2] Chapter 2008-39, L.O.F.

[3] Section 961.02(4), F.S.

[4] "The Bill Analysis and Fiscal Impact Statement prepared by the staff of the Judiciary Committee demonstrates that the Victims of Wrongful Incarceration Compensation Act was prompted by cases in which DNA evidence had exonerated defendants. *See* Fla. S. Bill Analysis & Fiscal Impact Statement of Mar. 26, 2008, § 2 for Bill CS/SB 756, p. 2 ("In Florida, at least nine people have been exonerated or released from incarceration since 2000, as a result of post-conviction DNA

Disqualifying Felonies
To be eligible for compensation, a wrongfully incarcerated person must not have a disqualifying felony, which is one of the following situations:

- The person had a prior conviction or pled guilty or nolo contendere to a felony offense in this state, a federal offense that is a felony, or to an offense in another state that would be a felony in this state;
- The person was convicted of, or pled guilty or nolo contendere to a felony offense while wrongfully incarcerated; or
- While wrongfully incarcerated, the person was serving a concurrent sentence for another felony for which the person was not wrongfully convicted.[5]

Court Process of Establishing Status as a Wrongfully Incarcerated Person
The claimant first files a petition with the original sentencing court seeking status as a wrongfully incarcerated person eligible for compensation. The claimant must allege in the petition that verifiable and substantial evidence of actual innocence exists and that the claimant is not disqualified from seeking compensation.[6]

The prosecuting authority has 30 days to submit a response to the court.[7]

Based on the prosecuting attorney's response, the court will either find that the petitioner has met his or her burden through clear and convincing evidence of innocence, or that based on a preponderance of the evidence, that the petitioner is ineligible for compensation due to a separate disqualifying felony.[8] If the court finds the petitioner ineligible, the court will dismiss the petition.[9]

If the prosecuting attorney contests the petition and raises issues of fact on the question of innocence, an administrative law judge must determine whether the petitioner is eligible for compensation.[10] The original sentencing court will then review the administrative law judge's finding and issue its own order within 60 days.[11]

Application Requirements for the Department of Legal Affairs
After receiving a court order vacating the conviction and the sentence, the claimant must file an application with the Department of Legal Affairs (DLA) within 2 years after the original sentencing court enters its order finding that the person is a wrongfully incarcerated person eligible for compensation.[12]

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testing."). The legislature was concerned about compensating persons who were actually innocent, but not necessarily about paying people who had been found not guilty." *Fessenden v. State*, 52 So. 3d (Fla. 2d DCA 2010).
[5] Section 961.04, F.S.
[6] Section 961.03(1)(a)1. and 2., F.S.
[7] Section 961.03(2), F.S.
[8] Section 961.03(3) and (4), F.S.
[9] Section 961.03(4)(a), F.S.
[10] Section 961.03(5), F.S.
[11] Section 961.03(6)(d), F.S.
[12] Section 961.05(1), F.S.

The claimant must provide through application:

- A certified copy of the order vacating the conviction and sentence;
- A certified copy of the original sentencing court's order finding the claimant to be a wrongfully incarcerated person who is eligible for compensation (meaning not disqualified);
- Certified copies of the original judgment and sentence;
- Documentation of the length of sentence served, including from the Department of Corrections (DOC) showing the person's admission and release from the custody of the DOC;
- Proof of identification, including two sets of fingerprints taken by a law enforcement agency and a current form of photo identification, showing that the applicant is the person wrongfully incarcerated;
- Supporting documentation of fines, penalties, and court costs imposed and paid by the wrongfully incarcerated person;
- Supporting documentation of reasonable attorney's fees and expenses; and
- Any documentation required by the DLA.[13]

The DLA forwards one set of fingerprints each to the Department of Law Enforcement (FDLE) and the Federal Bureau of Investigation (FBI) for a criminal records background check of the applicant.[14]

The DLA must notify the applicant of errors or omissions within 30 calendar days after receipt of the application and provide an opportunity to correct the application within 15 days.[15]

The DLA has 90 days to process a claim and must notify the claimant within 5 business days after its determination. If the DLA determines that the applicant meets all requirements, the applicant is eligible for compensation.[16]

Compensation

Compensation consists of:

- Monetary compensation, at the rate of $50,000 for each year of wrongful incarceration, subject to proration and inflation based on the Consumer Price Index;
- A waiver of tuition and fees for up to 120 hours of instruction at a public career center, community college, or state university;
- A refund of fines, penalties, and court costs imposed and paid;
- Reasonable attorney's fees and expenses incurred and paid; and
- Immediate expunction, including administrative expunction, of the person's criminal record of the wrongful arrest, conviction, and incarceration.

[13] Section 961.05(4), F.S.
[14] Section 961.05(5), F.S.
[15] Section 961.05(6), F.S.
[16] Section 961.05(6) and (7), F.S.

Total compensation is capped at $2 million.[17]

Wrongfully Incarcerated Persons Ineligible for Relief under Chapter 961, F.S.
Although the Wrongful Incarceration Act specifically provides compensation for wrongfully incarcerated persons, not all wrongfully incarcerated persons are eligible for relief under the Act.

James Richardson was the first man to file a claim under the Act. Mr. Richardson was convicted of murdering one of his children by poisoning (although all of his seven children and step-children died during the tragedy), in Arcadia in 1968. He spent over 21 years in prison, four of them on Death Row[18] before his sentence was eventually vacated and he was granted a new trial in 1989. The trial never occurred because the Miami-Dade State Attorney who had been assigned by the Governor to investigate allegations against the state of suborning perjury, using perjured testimony to obtain a conviction, and suppressing exculpatory evidence agreed to the new trial. The Special Prosecutor then filed a *nolle prosequi* in the case, thereby closing the case to further proceedings by the State.[19]

Mr. Richardson and DeSoto County subsequently settled a lawsuit over his wrongful prosecution for $150,000. The State contested his claim under the Act, however, and the matter went to a hearing before an Administrative Law Judge (ALJ) on July 17, 2009.[20] At the hearing, Mr. Richardson testified that he did not kill his children and took two approaches to provide verifiable and substantial evidence of his innocence in support of his testimony.

He first relied upon the investigation conducted by the Miami-Dade State Attorney and the testimony of one of its participants. Mr. Richardson's second approach was to attempt to show that the babysitter had murdered the children by presenting facts regarding the timing of her access to the children, her ability to poison the children's lunch, her suspicious behavior during the minutes after the children became violently ill, and a possible motive for her actions.[21] A 1988 affidavit written by the Arcadia Chief of Police in which he opined that Mr. Richardson had been framed and that the babysitter was the guilty party was also presented as evidence at the hearing.[22]

The ALJ found there to be "clear and convincing evidence that the investigation leading up to (Mr. Richardson's) prosecution and conviction was incomplete," that there was "conflicting evidence," that critical facts were never determined, conflicting statements were withheld from the defense, the State presented perjured testimony from jailhouse informants and apparently the

[17] Section 961.06(1), F.S.
[18] Richardson's death sentence was commuted to 25 years to life after the U.S. Supreme Court decided the 1972 *Furman v. Georgia* case that found unconstitutional procedural errors in capital cases and which required resentencing in cases where the death penalty had been handed down (408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).
[19] Florida Commission on Capital Cases, "Case Histories: A Review of 23 Individuals Released from Death Row," June 20, 2002; see also Sherrer, "Arcadia and the Twenty Year Effort to Exonerate James Joseph Richardson," http://justicedenied.org/arcadia.htm, September 11, 2008.
[20] *Id.* See also "Wrongly jailed inmate seeks compensation," the Associated Press, July 17, 2009, reported at http://www2.tbo.com.
[21] *Id.*
[22] *Id.*

sheriff, and that the "investigation appeared to focus only on (Mr. Richardson) as a suspect and not also on others whose involvement was suspicious."[23]

The ALJ found that while there *was* an absence of evidence proving Mr. Richardson guilty beyond a reasonable doubt (at the murder trial), there *was not* sufficient evidence at the hearing to find Mr. Richardson actually innocent as required by the Act.[24]

The ALJ explained that the Act requires consideration of the *factual sufficiency* (of the evidence) "[i]n other words, proof of actual innocence is required."[25] Paragraph 38 of the ALJ's findings of fact indicates that "hearsay," "suggestions," "opinion testimony," memoranda outlining the Governor-ordered investigation and responses thereto, testimony by individuals as to what they considered during their respective investigations, nor Mr. Richardson's own testimony denying his guilt constituted verifiable and substantial evidence of his innocence.[26]

Upon reviewing the ALJ's recommended order and a transcript of the hearing, the trial court entered its order denying Mr. Richardson's claim.[27] Mr. Richardson appealed the court's order and it was affirmed by the Second District Court of Appeal.[28]

III. Effect of Proposed Changes:

The bill makes a limited expansion in the type of evidence a claimant may use as proof of eligibility for compensation as a wrongfully incarcerated person under the "Victims of Wrongful Incarceration Compensation Act." Under the bill, a claimant is "innocent of the offenses charged" and eligible for compensation if:

- The Governor by an executive order appointed a special prosecutor to review the claimant's conviction;
- The special prosecutor entered a nolle prosequi for charges for which the claimant was convicted and sentenced to death; and
- The claimant was convicted and sentenced to death before January 1, 1980.

Under current law, a claimant's eligibility for compensation is established through a court order vacating the claimant's conviction and sentence as the result of exonerating evidence.

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[23] Recommended Order, *Richardson v. State*, Case No. 09-2718VWI, August 21, 2009.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Richardson v. State*, Case No. 09-2718VWI, Final Order, October 23, 2009. It is interesting to note that as in the Richardson case, some 41 years after a crime occurred it is unlikely that verifiable and substantial evidence of innocence is available to a claimant in a case where DNA evidence is nonexistent.
[28] *Richardson v. State*, 2010 WL 5464239 (Fla. 2d DCA December 29, 2010), referencing *Fessenden v. State*, 52 So.3d 35 (Fla. 2d DCA 2010) in which Fessenden's conviction was overturned on a *matter of law*. It was not overturned because the State failed to prove wrongdoing. In the *Fessenden* case analysis, the Court notes that "[w]hen an appellate court reverses a judgment and sentence for lack of evidence, it does not make any determination that the defendant is actually innocent; it merely determines that the State did not provide evidence that could support a verdict of guilt beyond a reasonable doubt. There is a substantial difference in our system of justice between the concept of 'not guilty' and that of 'actual innocence.'"

Under the bill, just as for other claims for compensation under ch. 961, F.S., only the wrongfully incarcerated person may pursue a claim. An estate or a personal representative of an estate is prohibited from filing a claim on behalf of a wrongfully incarcerated person.

To receive compensation, the wrongfully incarcerated person must submit an application to the DLA which includes:

- A certified copy of the nolle prosequi or nolle prosequi memorandum;
- Certified copies of the original judgment and sentence;
- Documentation of the length of sentence served, including from the Department of Corrections (DOC) showing the person's admission and release from the custody of the DOC;
- Proof of identification, including two sets of fingerprints taken by a law enforcement agency of this state and a current form of photo identification;
- Supporting documentation of fines, penalties, and courts costs imposed and paid by the wrongfully incarcerated person;
- Supporting documentation of reasonable attorney's fees and expenses; and
- Any documentation required by the DLA.

Application requirements are identical to the current requirements under s. 961.05, F.S., except that, instead of requiring a court order vacating conviction and sentence, the nolle prosequi entered into by the special prosecutor is required. Likewise, a mandatory background check confirming an absence of disqualifying felonies remains in place. And the timelines for the DLA to process applications are the same.

If the DLA determines that a claimant meets the requirements of the Act, the wrongfully incarcerated person is entitled to the same forms and amounts of compensation currently provided in law.

This bill clarifies that the Chief Financial Officer (CFO) may purchase multiple annuities selected by a wrongfully incarcerated person, instead of a single annuity, with the compensation awarded under the Victims of Wrongful Incarceration Compensation Act. In purchasing the annuities, the CFO must maximize the benefits to the wrongfully incarcerated person.

A claimant seeking compensation under the expanded eligibility criteria in the bill must apply to the DLA by July 1, 2016.

The bill takes effect July 1, 2014 and is repealed July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator does not expect a fiscal impact.[29]

The Department of Legal Affairs (DLA) does not expect a fiscal impact. To date, the DLA indicates that seven claims have been made since the inception of ch. 961, F.S., in 2008. Of these, three claims have been paid in the cases of Leroy McGee (2010), James Bain (2011), and Luis Diaz (2012). The DLA denied 1 claim, that of Jarvis McBride (2012). Three other claims resulted in findings of ineligibility or incomplete submission of application: Robert Lewis (2011), Edwin Lampkin (2012), and Ricardo Johnson (2013).

The DLA has incurred insignificant costs to process applications for compensation due to the scarcity of claims to date and because the claimant is responsible for providing necessary documentation.[30]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 961.055 and 961.056 of the Florida Statutes.

[29] Office of the State Courts Administrator, *2014 Judicial Impact Statement SB 326* (February 6, 2014).
[30] Email correspondence with Rob Johnson, Director of Legislative and Cabinet Affairs, Office of the Attorney General (February 5, 2014).

IX. Additional Information:

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

CS by Judiciary on February 11, 2014:
The committee substitute:

- Clarifies that the Chief Financial Officer (CFO) may purchase multiple annuities selected by a wrongfully incarcerated person instead of a single annuity.
- Specifies that in entering into annuity contracts for the compensation awarded under the Victims of Wrongful Incarceration Compensation Act, the CFO must maximize the benefit to the wrongfully incarcerated person.

B. Amendments:

None.