



The Florida Senate

Interim Project Report 2006-140

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Committee on Judiciary

Senator Daniel Webster, Chair

COMPENSATION FOR WRONGFUL INCARCERATION

SUMMARY

Most innocent persons are not able to obtain compensation through traditional legal avenues when they have been wrongfully incarcerated. The Legislature previously has compensated some of these individuals through claim bills. However, some legislators and commentators view the claim bill process as unfair and uncertain. As an alternative, the Legislature could authorize courts to award compensation in lawsuits against the state. The courts or the Governor and Cabinet would determine innocence and eligibility for compensation. Awards of compensation could be based on actual damages, the length of incarceration, or on a combination of factors.

BACKGROUND

A fundamental principal of criminal law states "that it is better that ten guilty persons escape, than that one innocent suffer."¹ Despite the safeguards in the criminal justice system, innocent persons sometimes do go to prison. In most cases, the wrongfully incarcerated have no right to compensation for their loss of liberty. This interim project report addresses whether, how, and to what extent innocent persons who have been wrongfully incarcerated should be compensated by the state.

¹ 4 William Blackstone, Commentaries 352 and *Hugh v. State*, 751 So. 2d 718, 720 (Fla. 5th DCA 2000), and *see In the Matter of Winship* 397 U.S. 358, 372 (1970) (stating: "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free") (Harlan, J., concurring).

Prior Compensation Legislation

On August 11, 2004, Wilton Dedge was released from incarceration after 22 years in prison.² His release was based on DNA evidence that proved he was innocent of the rape for which he was convicted.³ The Legislature responded to the exoneration during the 2005 Regular Session with legislation to create a mechanism to compensate certain innocent persons who have been wrongfully incarcerated. Senate Bill 1964 proposed an administrative process under the Attorney General in which a person found innocent by a court could obtain up to \$5 million as compensation for economic damages. Under House Bill 1879, a person who was incarcerated for a crime and found innocent by a court could apply for compensation from the Legislature. The House bill, however, did not appear to expand the rights a wrongfully incarcerated person already has through the claim bill process. Neither bill became law. Wilton Dedge and his parents filed a lawsuit against the state seeking compensation for his wrongful incarceration.⁴

In Senate Bill 12-B, 2005 Special Session B, the Legislature appropriated \$2 million as compensation for Wilton Dedge.⁵ The payment, however, is contingent on the satisfaction of several conditions before March 6, 2006. These conditions require the

² See State's Motion to Grant Defendant's 3.850 Motion, Dismiss Pending Charges and Discharge the Defendant from Custody, *State of Florida v. Dedge* (Fla. 18th Cir. Ct. Aug. 11, 2004) and Order, *State of Florida v. Dedge*, (Fla. 18th Cir. Ct. Aug. 11, 2004).

³ According to Jennifer Greenberg, Director of the Florida Innocence Initiative, Inc., Frank Lee Smith, Jerry Townsend, Wilton Dedge, and Luis Diaz are the only persons to be exonerated based on DNA evidence in this state since 2001. As of December 28, 2005, 170 people had been exonerated based on DNA evidence nationwide. Innocence Project at <http://www.innocenceproject.org/>.

⁴ See *Taking of Liberty* for a discussion of the lawsuit, *infra* p. 3.

⁵ Chapter 2005-354, L.O.F.

Dedge family to dismiss with prejudice the lawsuit that they have filed against the state and waive any other claims that they may have. The compensation authorized will be used to purchase an annuity. Senate Bill 12-B also waives tuition requirements for Mr. Dedge for up to 120 hours of instruction at state career centers, community colleges, and state universities to which he is admitted. The tuition benefit under the bill is similar to the benefits received by children of police officers who were killed in the line of duty.

How Wrongful Convictions Happen

Wrongful convictions occur for several reasons.

[S]tudies have shown that approximately fifty percent of those wrongly convicted were convicted based on eyewitness identification evidence. This makes mistaken identity the factor most often responsible for wrongful conviction.⁶

Other causes of wrongful conviction include: suppression of evidence, false or coerced confessions, inadequate defense counsel, perjured testimony, and junk science.⁷

Procedures for Release from Incarceration

Courts may release innocent persons from incarceration as a result of acquittals in new trials and as a result of postconviction relief based on newly discovered evidence.⁸ The Rules of Criminal Procedure establish time limits in which requests for new trials or postconviction relief must be made. A motion for a new trial generally must be filed within 10 days after the rendition of a verdict. A claim for postconviction relief based on newly discovered evidence, generally, must be made within two years after the judgment and sentence become final. However, a court has the

inherent authority to vacate, modify, open, or act upon judgments made by mistake at any time.⁹

In the case of Wilton Dedge, the prosecution filed a motion to support the defense motion to vacate judgment and sentence, to dismiss pending charges, and to discharge Mr. Dedge from custody.¹⁰ In support of the motion, the prosecution stated that Y-Chromosome testing excluded Mr. Dedge as the contributor of biological evidence found on the rape victim. The prosecution further stated that the biological evidence could have only come from the perpetrator of the sexual assault. On the same day that the prosecution motion was filed, the court granted the defense and prosecution motions, dismissed all charges, and discharged Mr. Dedge from incarceration.¹¹ Mr. Dedge, however, was not declared innocent by the court's order.

Causes of Action for Compensation

A person who has been exonerated or acquitted after a new trial has little chance of receiving compensation for the loss of his or her liberty.¹² 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. Theories that have been discussed in law review articles to obtain compensation 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.¹³ Such civil rights violations include malicious

⁶ *Lee v. State*, 873 So. 2d 582, 584 (Fla. 3d DCA 2004) (quoting Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 PACE L. REV. 815 (1994)).

⁷ See, e.g., EDWARD CONNORS ET AL., U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (June 1996) and Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 76 (1999).

⁸ See Fla. R. Crim. P. 3.580-3.600 and 3.850.

⁹ *State v. Burton*, 314 So. 2d 136, 138 (Fla. 1975).

¹⁰ State's Motion to Grant Defendant's 3.850 Motion, *supra* note 2.

¹¹ Order, *State of Florida v. Dedge*, (Fla. 18th Cir. Ct. Aug. 11, 2004).

¹² See *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997).

¹³ 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,

prosecution, extraction of an involuntary confession, suppressed evidence, or a lack of probable cause for an arrest or a search.¹⁴ Only a small percentage of wrongful incarcerations result from civil rights violations.¹⁵ Additionally, the police, prosecution, and judiciary are often immune from civil rights lawsuits.¹⁶ 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.¹⁷ 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.¹⁸ 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."¹⁹ Prosecutors, likewise, are protected by judicial immunity.²⁰

Taking of Liberty

Wilton Dedge recently pursued a novel approach to obtain compensation for his wrongful incarceration. In

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.

¹⁴ Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 691 (Spring 2002).

¹⁵ Ashley H. Wisneski, *'That's Just Not Right: Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88 MASS. L. REV. 138, 147 (Winter 2004).

¹⁶ Bernhard, *supra* note 7, at 87.

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

¹⁸ *Id.*

¹⁹ *Kalmanson v. Lockett*, 848 So. 2d 374, 379 (Fla. 5th DCA 2003).

²⁰ *Office of the State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097 (Fla. 1993).

a lawsuit against the state, Mr. Dedge alleged in part that the state took a constitutionally protected liberty interest from him.²¹ The trial court dismissed the lawsuit on the grounds that the suit was barred by the doctrine of sovereign immunity.²² Further, the court stated that "only the Legislature can address the issue of compensation under existing law." The court's ruling was subsequently appealed, but the appeal was dismissed for technical reasons.²³ Similarly, case law suggests that the takings clause of the U.S. Constitution does not apply to a deprivation of liberty.²⁴

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.²⁵

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 access to the courts if such suits were allowed would severely hamper our adversary system.²⁶

Under the federal civil rights laws, crime victims and witnesses are immune from liability for statements unless malice is involved.²⁷

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

²¹ *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).

²² Order Granting Amended Motion to Dismiss, *Dedge v. Crosby* (Fla. 2d Cir. Ct. August 29, 2005).

²³ *Dedge v. Crosby*, 2005 WL 3159616 (Fla. 1st DCA 2005).

²⁴ See *Jones v. Philadelphia Police Department*, 57 Fed. Appx. 939 (3d Cir. 2003) and *Hurtado v. United States*, 410 U.S. 578 (1973).

²⁵ See *Stucchio v. Tincher*, 726 So. 2d 372 (Fla. 5th DCA 1999).

²⁶ *Id.* at 374 (quoting *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. 5th DCA 1984)).

²⁷ *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992).

innocence.²⁸ 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

Claim bills have been used by the state previously to compensate wrongfully incarcerated persons. A claim bill, sometimes called a relief act, 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. It is a means by which an injured party may recover damages even though the officer or agency involved may be immune from suit. Claim bills are uniquely legislative in nature, and the process for filing claim bills is covered by House and Senate rules.

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. 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. 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 found innocent by the Legislature.

The claim bill process, however, has been perceived by some as benefiting those with political connections.²⁹ Compensation under claim bills may also lack uniformity in their amounts.³⁰ Further, the outcome of the claim bill process is “always uncertain.”³¹ On the other hand, the claim bill process: “preserve[s] the general protections of sovereign immunity, while at the

same time satisfying ‘moral’ or ‘honorary’ debts of the State.”³²

METHODOLOGY

As part of this interim project, committee staff conducted research to identify methods for compensation for wrongful incarceration currently in existence in this state and methods available in other jurisdictions; examined mechanisms providing compensation for takings of property by government to aid in the identification of additional methods to provide compensation for wrongful incarceration; interviewed a wrongfully incarcerated person and his representatives; and consulted with prosecutors, public defenders, a judge, and potential agencies that may be directed to administer a compensation program.

FINDINGS

Justifications for Compensation Policy

Innocent persons who have been wrongfully incarcerated have suffered economic and non-economic damages. These damages include lost wages, funds spent on defense from prosecution and release from incarceration, health and psychological problems, lost property, lost earnings capacity, lost educational opportunities, pain and suffering, damages to reputation, lost relationships with families, and other damages. The families of the wrongfully incarcerated may have suffered as well.

The state plays the largest role in the wrongful incarceration of an innocent person – including the criminal investigation, the prosecution, the conviction in a court, and sometimes the criminal defense.³³ As a result, a rationale exists for the state to share at least some of the damages resulting from a wrongful incarceration.³⁴

Similarly, before the state waived its sovereign immunity under s. 768.28, F.S., the state had no legal obligation to compensate people for its negligence.

²⁸ *Schreiber v. Rowe*, 814 So. 2d 396, 399 (Fla. 2002).

²⁹ Lloyd Dunkelberger, *Lawmakers Refuse To Fund Claims Bills*, THE LEDGER, June 9, 2005; Lopez, *supra* note 14, at 705; and Bernhard, *supra* note 7, at 94 (stating that approval of a claim bill depends more on political connections and the political climate than the merits of the claim).

³⁰ See John J. Johnston, *Reasonover v. Washington: Toward a Just Treatment of the Wrongly Convicted in Missouri*, 68 UMKC L. REV. 411, 415 (Spring 2000).

³¹ Bernhard, *supra* note 7, at 94.

³² Johnston, *supra* note 30, at 415.

³³ See Bernhard, *supra* note 7, at 93 (stating, “it is the state, through operation of one of its most essential services--the criminal justice system--that has inflicted the harm”).

³⁴ See Johnston, *supra* note 30, at 414 (stating that “the public, as a superior riskbearer, should bear the burden when necessary to allocate losses caused by the justice system”).

However, the state has found by its waiver of sovereign immunity and the claim bill process that it may have a moral obligation to compensate injured persons. The same moral justification for compensating persons injured by the state's negligence can support the development of a statewide policy compensating the wrongfully incarcerated.

Compensation Available in Other Jurisdictions

The federal government, the District of Columbia, and 18 states expressly authorize compensation for wrongful incarceration by statute.³⁵ A review of the 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.³⁶ 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.³⁷

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.³⁸ Compensation amounts are determined by the judiciary in most jurisdictions. In the other jurisdictions, compensation amounts are determined by an administrative body.³⁹ 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.⁴⁰ Compensation is subject to appropriation by the Legislature.⁴¹ In Wisconsin, the portion of an award in excess of \$25,000 must be approved by the Legislature.⁴²

Awards of compensation can vary widely among jurisdictions. In the District of Columbia, Maryland, New York, and West Virginia, awards of compensatory damages are unlimited. 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. 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.

New York has received and approved the most claims of the states providing claim experiences for this report. From 1985 to February 16, 2005, 224 claims for compensation have been filed with the New York Court of Claims.⁴³ Compensation was provided for 32 claims with payments totaling \$16.2 million. The highest payment to a single claimant was \$3.3 million. Claims from 163 claimants were dismissed, and 29 claims are pending. Research for this report has not identified any factors that might cause Florida's claim experience to be significantly different from other states, if the Legislature creates a compensation program.⁴⁴

Components of a Compensation Process

Based on a review of compensation statutes from other jurisdictions and law review articles on wrongful incarceration, compensation legislation has several

³⁵ 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.

³⁶ See 705 ILL. COMP. STAT. 505/8; MD. CODE ANN., STATE FIN. & PROC. s. 10-501; and TENN. CODE ANN. s. 40-27-109.

³⁷ See CAL. PENAL CODE s. 4903 and WIS. STAT. s. 775.05.

³⁸ 28 U.S.C. s. 2513.

³⁹ See CAL. PENAL CODE s. 4903 and WIS. STAT. s. 775.05.

⁴⁰ ALA. CODE s. 29-2-151 *et seq.*

⁴¹ ALA. CODE s. 29-2-165.

⁴² WIS. STAT. s. 775.05.

⁴³ The New York claim-experience statistics were provided by Kevin Macdonald, Senior Attorney, New York State Court of Claims.

⁴⁴ California has approved 5 of 26 claims for compensation since 2001. Conversation with Neil Ennes, Legislative Representative, California Victim Compensation and Government Claims Board, Aug. 8, 2005. Ohio has approved 24 of 38 claims filed since 1987. Monique Wheeler, Ohio Court of Claims. Illinois has approved 32 claims with payments totaling \$4.2 million since 2000. Bill Kline, Deputy Court Administrator, Illinois Court of Claims.

primary components. Compensation legislation describes who is eligible for compensation, who will determine eligibility, and how compensation amounts will be determined and paid.

Eligibility

The fundamental issue of any compensation statute is who should be eligible for compensation for wrongful incarceration. Most law review articles and statutes appear to be in agreement that compensation should be limited to innocent persons. Often innocence must be proven by clear and convincing evidence.⁴⁵ However, under some statutes not all innocent persons are eligible for compensation. For example, in the District of Columbia, compensation is not available to persons who have pled guilty to crimes unless the guilty plea was made to avoid the death penalty.⁴⁶ Similarly, in New York, compensation is not available to a person whose conduct caused or brought about the conviction.⁴⁷ Additionally, some statutes only authorize compensation for wrongful incarcerations resulting from felony convictions.⁴⁸

Requiring innocence to be established by clear and convincing evidence places a claimant in the position of proving a negative.⁴⁹ In a 1985 opinion predating the use of DNA evidence, a court suggested that clear and

⁴⁵ The clear and convincing evidence standard:

requires more proof than a “preponderance of the evidence” but the less than “beyond and to the exclusion of a reasonable doubt.”

....

Clear and convincing evidence has been described as follows:

This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

In Re Inquiry Concerning a Judge, 832 So. 2d 716, 726 (Fla. 2002) (quoting *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994)).

⁴⁶ D.C. CODE ANN. s. 2-425.

⁴⁷ N.Y. CT. CL. ACT s. 8-b4.

⁴⁸ Alabama, California, Massachusetts, and North Carolina authorize compensation for incarceration for felony offenses. Wrongful incarceration compensation statutes in other states permit compensation for incarceration for felony and misdemeanor offenses.

⁴⁹ *Reed v. State of New York*, 571 N.Y.S.2d 195, 199 (NY 1991).

convincing evidence of innocence might only be established “where another person confesses to the crime and such confession is accepted by the judicial authorities.”⁵⁰ One commentator has argued for an alternative to proving actual innocence. According to the commentator, eligibility for compensation could be established if, in light of new evidence, no reasonable juror would have voted to find a claimant guilty beyond a reasonable doubt.⁵¹

The challenges of establishing eligibility by proving actual innocence by clear and convincing evidence can be highlighted by the case of Luis Diaz. More than 25 sexual assaults that occurred in the late 1970s in the Bird Road area of Coral Gables were attributed to the “Bird Road Rapist.”⁵² These assaults were attributed by authorities to a single individual because of the similarities among the crimes.⁵³ In a single trial, Mr. Diaz was tried for eight of the assaults and was convicted of seven. In 1994, two victims recanted their identification of Mr. Diaz as the perpetrator. More recently, DNA evidence from one of the recanting victims and DNA evidence from an uncharged rape attributed to the Bird Road Rapist were tested. The test results showed that the same person raped both victims and that the perpetrator of the rapes was not Mr. Diaz. No evidence was available to test from the other rapes for which Mr. Diaz was convicted. On August 3, 2005, after nearly 26 years in prison, the five remaining rape convictions were vacated, and Mr. Diaz was released from incarceration. “Prosecutors stopped short of declaring Diaz innocent in all the rapes, instead citing the difficulty of retrying him after a quarter of a century.”⁵⁴ As such, reasonable doubt exists that Mr. Diaz was guilty of the charged assaults. Mr. Diaz’s ability to produce clear and convincing evidence of actual innocence for all of the assaults is less certain.

Legislation from last session would have limited the class of innocent persons eligible for compensation for wrongful incarceration.⁵⁵ Senate Bill 1964 would have barred compensation to persons who had prior felony

⁵⁰ *Reed v. State of New York*, 129 Misc. 2d 517, 523 (NY Ct. Cl. 1985).

⁵¹ Johnston, *supra* note 30, at 427.

⁵² Innocence Project at http://www.innocenceproject.org/case/display_profile.php?id=164.

⁵³ Joint Motion for Post Conviction Relief, *State of Florida v. Diaz* (Fla. 11th Cir. Ct. Aug. 3, 2005).

⁵⁴ John Pain, *26 Years Later, DNA Clears Man of Rapes*, YAHOO NEWS, August 3, 2005, at http://news.yahoo.com/news?tmpl=story&u=/ap/20050804/ap_on_re_us/rapes_dna_exoneration_6.

⁵⁵ Senate Bill 1964, Second Engrossed (2005 Session).

convictions, persons who were acquitted or not prosecuted after new trials had been ordered, and persons who confessed or pled guilty to crimes for which they were convicted. However, no information is known to establish that the innocent persons excluded from receiving compensation under last session's legislation have suffered any less than those who would have been eligible.

Determination of Innocence

Some entity must determine who is innocent and eligible for compensation. In most jurisdictions with wrongful incarceration compensation statutes, innocence is determined by a court. Such judicial determinations of innocence, if made by a Florida court, should be made during a civil proceeding.⁵⁶ Additionally, the Governor and Cabinet of this state have historically reviewed criminal cases of those seeking pardons.⁵⁷ As such, a pardon based on innocence could trigger the compensation process. Administrative agencies in other jurisdictions have made innocence determinations. However, agency staff representing the Division of Risk Management and the Office of the Attorney General did not believe that their agencies were appropriate entities to determine innocence.

Compensation

Compensation could potentially include compensation for economic losses, such as lost wages and reimbursement of attorney's fees; non-economic damages, such as pain and suffering; and punitive damages. Economic losses of a wrongfully incarcerated person are easier to measure than non-economic damages. However, records of economic losses may have been lost for persons who have served long prison sentences. No standards exist to objectively measure non-economic damages. Punitive damages are typically prohibited in claims against a state. Other compensation could include tuition waivers, job training, or employment preferences.

Attempting to accurately calculate losses or damages suffered by a wrongfully incarcerated person may be time consuming and require the use of costly expert witnesses. Any delay in the payment of compensation

may delay a wrongfully incarcerated person's reintegration back into society. As such, a simple approach that determines compensation based on the length of time served may be efficient for the wrongfully incarcerated person and for the state. Several states determine compensation, in part, by multiplying the length of incarceration by a figure determined by the legislature. Louisiana, for example, pays \$15,000 per year.⁵⁸ In addition to an annual amount of compensation, Iowa authorizes the reimbursement of attorney's fees and some lost wages.⁵⁹ Frequently, compensation for wrongful incarceration is subject to a cap. The federal government will pay actual damages up to \$50,000 per year in some cases. Tennessee will pay up to \$1 million in actual damages.

Regardless of how compensation is calculated, commentators have recommended that compensation for wrongfully incarcerated persons take into account their financial, medical, educational, and psychological needs.⁶⁰ According to one law review article, compensation for wrongful incarceration should:

- (1) provide money for the wrongfully convicted to compensate them for their time in prison,
- (2) provide job training and education resources designed to help the wrongfully convicted make the transition from prison to freedom, and
- (3) allow the wrongfully convicted to receive medical and psychological care for problems resulting from their time in prison.⁶¹

House Bill 1879, 2005 Leg. Sess., attempted to respond to some of the needs of the wrongfully incarcerated person with non-monetary compensation in addition to monetary compensation. The House legislation would have authorized the purchase of health insurance, tuition waivers, an employment preference for employment in state government, and waived fees required to expunge records. Few states provide non-monetary compensation to the wrongfully incarcerated.⁶²

⁵⁸ LA. REV. STAT. ANN. s. 15:572.8.

⁵⁹ IOWA CODE s. 663A.1.

⁶⁰ Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 171 (Winter 2004).

⁶¹ *Id.*

⁶² See TEX. CIV. PRAC. & REM. CODE ANN. s. 103.052 (authorizing mental health counseling for one year); MONT. CODE ANN. s. 53-1-214 (authorizing education assistance).

⁵⁶ Discussion with Judge Charles Francis, Chief Judge, Second Judicial Circuit, July 14, 2005. Judge Francis suggested that a civil proceeding is appropriate because of caseloads of judges presiding over criminal cases and differences in the burden of proof between criminal proceedings and civil proceedings.

⁵⁷ See s. 8, Art. IV, State Const.

Senate legislation from last session would have authorized compensation for economic damages only. Additionally, during last session, representatives of Wilton Dedge informed the Legislature that his parents mortgaged their home to fund Wilton's criminal defense. In response, last session's Senate legislation was drafted to authorize the state to reimburse family members who paid criminal defense fees on behalf of a wrongfully incarcerated person. Other jurisdictions have not authorized payments to any person other than a wrongfully incarcerated person.

Payment

Many wrongfully incarcerated persons, especially those who have served long prison sentences, may not have the financial skills to manage a large sum of money.⁶³ Further, the payment of a large sum of money does not guarantee that a wrongfully convicted person can reintegrate into society and have a somewhat normal life.⁶⁴

Payments to wrongfully incarcerated persons have been authorized by annuity or by lump sum in other jurisdictions. Often the entity making the payment has the discretion to select the payment mechanism or duration of the annuity. Payment by annuity may be a sufficient method to ensure that a wrongfully incarcerated person does not quickly exhaust his or her compensation and become dependent upon the state.

In SB 1964, 2005 Leg. Sess., payments to a wrongfully incarcerated person were to be made by an annuity. The annuity would revert to the state in the event that the wrongfully incarcerated person was convicted of a subsequent felony. Additionally, Senate Bill 1964 prohibited attorneys' fees for the costs of obtaining compensation.

Criminal History Records

After their release from incarceration, wrongfully incarcerated persons may still have a criminal record. These records are public records and would be provided to any person such as potential employers and landlords in response to a background check. Records relating to Wilton Dedge, for example, state that he was convicted of sexual assault despite the dismissal of the underlying charges. Further, the records make no mention of his exoneration. Any legislation providing

for compensation of a wrongfully incarcerated person could provide for the expunction or correction of criminal history records held by state agencies.

RECOMMENDATIONS

Some legal scholars believe that states are in the best position to share the losses of innocent persons who have been wrongfully incarcerated. Further, state criminal justice systems play the largest role in the loss of liberty for wrongfully incarcerated persons. According to some legislators and commentators, compensation should be provided to wrongfully incarcerated persons through a uniform statewide policy rather than claim bills.

In Florida, innocence and eligibility for compensation may best be determined by a court or the Governor and Cabinet. These entities have had the most experience in criminal matters. This report also recommends the consideration of two models for compensation to be awarded by a court in a lawsuit against the state.

Under the actual-damages model, compensation could be established through expert witnesses. Under a formula-based model, compensation could be based on the length of incarceration. Compensation under the latter model could be calculated by multiplying the average wage of the state on the date of release, or other figure, by the number of years served. Formula-based compensation may be determined quickly and inexpensively and provide the Legislature with some fiscal oversight. Alternatively, the models could be combined to authorize compensation based on the length of incarceration plus some actual damages, such as reimbursement of criminal defense fees.

This report also recommends that the payment of compensation be made through an annuity. Payment in this manner may prevent a wrongfully incarcerated person from rapidly depleting his or her funds. The state can also be made the beneficiary of the annuity if a wrongfully incarcerated person engages in future criminal conduct.

Lastly, this report recommends that a person's criminal history records be expunged or corrected upon a determination of innocence.

⁶³ Armbrust, *supra* note 60, at 173.

⁶⁴ *See id.* at 175-179 (discussing the difficulties of reentering society and examples of psychological harm resulting from wrongful incarceration).