

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: SPB 7084

INTRODUCER: For consideration by Judiciary Committee

SUBJECT: Compensation for Wrongfully Incarcerated Persons

DATE: February 7, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

During the 2005 Regular Session, both the House of Representatives and the Senate proposed legislation to compensate wrongfully incarcerated persons. The two chambers, however, were unable to agree on how to create the compensation process. This bill is the final version of the Senate proposal, SB 1964, Second Engrossed (2005).

This bill creates a process to compensate persons who have been wrongfully incarcerated by the state. The process is triggered when a person serving a sentence for a felony conviction is released from prison based on exonerating evidence. Under those circumstances, a judge must find whether clear and convincing evidence shows that the released person is innocent and thus a wrongfully incarcerated person. Once a person is found to have been wrongfully incarcerated, with some exceptions, he or she is eligible to apply for up to \$5,000,000 in economic damages from the state.

This bill creates the following sections of the Florida Statutes: 961.01, 961.02, 961.03, 961.04, and 961.05.

II. Present Situation:

In Florida, five people have been exonerated or released from incarceration since 2001 based on the results of post conviction DNA testing.¹ Nationwide, 174 people have been exonerated or released from incarceration since 1989 based on post conviction DNA testing.²

¹ Frank Lee Smith, Jerry Townsend, Wilton Dedge, Luis Diaz, and Alan Crotzer are the five persons who have been exonerated or released from incarceration in this state based on DNA testing.

² Innocence Project at <http://www.innocenceproject.org/index.php>.

Potential Causes of Action for Wrongful Incarceration

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.³ 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.⁴ 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.⁵ Only a small percentage of wrongful incarcerations result from civil rights violations.⁶ Additionally, the police, prosecution, and judiciary are often immune from civil rights lawsuits.⁷

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.⁸ 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.⁹ 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

³ See *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997).

⁴ 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.

⁵ Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 691 (Spring 2002).

⁶ Ashley H. Wisneski, *'That's Just Not Right: Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88 MASS. L. REV. 138, 147 (Winter 2004).

⁷ Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 87 (1999).

⁸ See Third Amended Complaint, *Townsend v. Jenne et al.*, (Fla. 17th Cir. Ct. May 19, 2004).

⁹ *Id.*

matter how unfair, injurious or inappropriate.”¹⁰ Prosecutors, likewise, are protected by judicial immunity.¹¹

Taking of Liberty

Wilton Dedge recently 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.¹² The trial court dismissed the lawsuit on the grounds that the suit was barred by the doctrine of sovereign immunity.¹³ 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.¹⁴ Similarly, case law suggests that the takings clause of the U.S. Constitution does not apply to a deprivation of liberty.¹⁵

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.¹⁶

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.¹⁷

Under the federal civil rights laws, crime victims and witnesses are immune from liability for statements unless malice is involved.¹⁸

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.¹⁹ Damages, however, against a public defender are limited under s. 768.28, F.S., to \$100,000 per claim and \$200,000 per occurrence.

¹⁰ *Kalmanson v. Lockett*, 848 So. 2d 374, 379 (Fla. 5th DCA 2003).

¹¹ *Office of the State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097 (Fla. 1993).

¹² *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).

¹³ Order Granting Amended Motion to Dismiss, *Dedge v. Crosby* (Fla. 2d Cir. Ct. August 29, 2005).

¹⁴ *Dedge v. Crosby*, 2005 WL 3159616 (Fla. 1st DCA 2005).

¹⁵ See *Jones v. Philadelphia Police Department*, 57 Fed. Appx. 939 (3d Cir. 2003) and *Hurtado v. United States*, 410 U.S. 578 (1973).

¹⁶ See *Stucchio v. Tincher*, 726 So. 2d 372 (Fla. 5th DCA 1999).

¹⁷ *Id.* at 374 (quoting *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. 5th DCA 1984)).

¹⁸ *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992).

¹⁹ *Schreiber v. Rowe*, 814 So. 2d 396, 399 (Fla. 2002).

Compensation Available in Other Jurisdictions

The federal government, the District of Columbia, and 18 states expressly authorize compensation for wrongful incarceration by statute.²⁰ 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.²¹ 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.²²

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.²³ Compensation amounts are determined by the judiciary in most jurisdictions. In the other jurisdictions, compensation amounts are determined by an administrative body.²⁴ 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.²⁵ Compensation is subject to appropriation by the Legislature.²⁶ In Wisconsin, the portion of an award in excess of \$25,000 must be approved by the Legislature.²⁷

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.

From 1985 to February 16, 2005, 224 claims for compensation have been filed with the New York Court of Claims.²⁸ 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.

²⁰ 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. 743.48; 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.

²¹ See 705 ILL. COMP. STAT. 505/8; MD. CODE ANN., STATE FIN. & PROC. s. 10-501; and TENN. CODE ANN. s. 40-27-109.

²² See CAL. PENAL CODE s. 4903 and WIS. STAT. s. 775.05.

²³ 28 U.S.C. s. 2513.

²⁴ See CAL. PENAL CODE s. 4903 and WIS. STAT. s. 775.05.

²⁵ ALA. CODE s. 29-2-151 *et seq.*

²⁶ ALA. CODE s. 29-2-165.

²⁷ WIS. STAT. s. 775.05.

²⁸ The New York claim-experience statistics were provided by Kevin Macdonald, Senior Attorney, New York State Court of Claims.

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.
- 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 son of the Crosley's, 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 found innocent by the Legislature.²⁹

III. Effect of Proposed Changes:

During the 2005 Regular Session, both the House of Representatives and the Senate proposed legislation to compensate wrongfully incarcerated persons. The two chambers, however, were unable to agree on how to create the compensation process. This bill is the final version of the Senate proposal, SB 1964, Second Engrossed (2005).

This bill creates a process to compensate persons who have been wrongfully incarcerated by the state. The process is triggered when a person serving a sentence for a felony conviction is released from prison based on exonerating evidence. Under those circumstances, a judge must find whether clear and convincing evidence shows that the released person is innocent and thus a wrongfully incarcerated person. Once a person is found to have been wrongfully incarcerated, he or she is eligible to apply for up to \$5,000,000 in economic damages from the state. The bill, however, makes the following persons ineligible for compensation:

- persons who pled guilty to the offense for which he or she was wrongfully incarcerated;
- persons who were convicted of a felony other than the felony for which he or she was wrongfully incarcerated; or
- persons who aided or acted as an accomplice to a person who committed the crime.

Available Compensation

Compensation is limited to \$5 million per applicant. The compensation is calculated by examining losses incurred, services performed for the state while the applicant was incarcerated,

²⁹ The story of J. B. Brown as described below is particularly dramatic.

J. B. Brown . . . was convicted and sentenced to hang for the murder of a railroad worker, Harry E. Wesson. Mr. Wesson's body was discovered as it lay in the shop yard of the Florida Southern Railway, in the early morning hours of October 17, 1901. Mr. Wesson had been shot in the head at point blank range. There were no witnesses, the weapon was never recovered, and there were a number of equally likely suspects. The criminal investigation focused on J.B. Brown when it was imagined that he had been previously fired from the railroad and that information provided by Wesson had contributed to the dismissal. Although there was no direct evidence linking J.B. Brown to the murder, and although he steadfastly maintained his innocence, bits of circumstantial evidence combined with perjured testimony supplied by cell-mates convinced harried police, under pressure to solve the crime, to indict Mr. Brown and later persuaded jurors to convict him. [A] "specially built gallows" was constructed for the hanging. "Brown was lead [sic] to the gallows, and the rope adjusted about his neck." But before the trap door could open, the warrant of execution was read aloud to those present. Somehow names had been transposed and the formal document ordered the execution of the foreman of the jury that had sentenced Brown to death. Brown's life was saved and his death sentence commuted to life in prison, so that when the real killer confessed twelve years later, Brown was still alive to be released from prison as an elderly and disabled man. Sixteen years after his release, the Florida Legislature decided to award Mr. Brown \$2,492 as compensation for the years he spent in prison.

Bernhard, *supra* note 7, at 76-77 (footnotes omitted).

and expenses incurred or likely to be incurred. Compensable losses include losses such as lost wages or salary, assets lost to creditors, lost earnings capacity, and the reasonable amount of other losses. Compensation also is available to reimburse an applicant for fines and court costs, fees paid to the Department of Corrections, attorney's fees, and the cost of future psychological counseling. No compensation is available for punitive or exemplary damages, pain and suffering, emotional distress, humiliation, or similar damages.

Compensation Procedure

A wrongfully incarcerated person may apply to the Attorney General for compensation. The application for compensation must include all available documentation of compensable items. Upon receipt of the application, the Attorney General must attempt to negotiate with the applicant and provide the applicant with a written offer to settle the claim for compensation. If the applicant rejects the offer by the Attorney General, the applicant may sue the state for compensation in court. If the award of compensation is greater in court than the offer by the Attorney General, the state must pay the applicant's attorney's fees and costs. Otherwise, the bill prohibits the payment of attorney's fees for the pursuit of compensation.

Payment Structure

The first \$500,000 of any compensation award to an applicant is payable in a lump sum. The remainder is payable over 10 years through an annuity. The annuity is payable to the state in the event that the wrongfully incarcerated person is convicted of a subsequent felony. Compensation as reimbursement of attorney's fees and related costs paid by a family member of the wrongfully incarcerated person are payable directly to the family member.

Application Window

To apply for compensation under the bill, a person must apply for compensation by July 1, 2008, or within two years after he or she was ordered released from incarceration, whichever is later. However, persons released from incarceration before October 1, 2001, are ineligible to apply for compensation. October 1, 2001, was the effective date of s. 925,11, F.S., the statute authorizing postsentencing DNA testing.

Effective Date

The bill takes effect on July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Wrongfully incarcerated persons are made eligible for compensation from the state.

C. Government Sector Impact:

The Office of the Attorney General may incur some fiscal impact from the implementation of the bill; however, the estimated impact has not been ascertained.

The fiscal impact of the bill is unknown. Few people, however, are likely to be eligible for compensation as a wrongfully incarcerated person. A finding that a person is a wrongfully incarcerated person must be established by clear and convincing evidence.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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