



Upon approval of a wrongfully incarcerated person's application, the person is eligible for compensation in the amount of \$50,000 per year of imprisonment (adjusted for inflation using the Consumer Price Index beginning January 1, 2009) in one lump-sum payment, 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

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<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).

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>

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." 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

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

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.<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

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<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.*

- 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 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>

### **Pending Claim Bills for Alan Crotzer**

Currently, there are claim bills pending in the House and Senate providing for an appropriation to compensate Alan J. Crotzer for his wrongful incarceration.<sup>27</sup> Mr. Crotzer spent 24 and one-

<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

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 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>

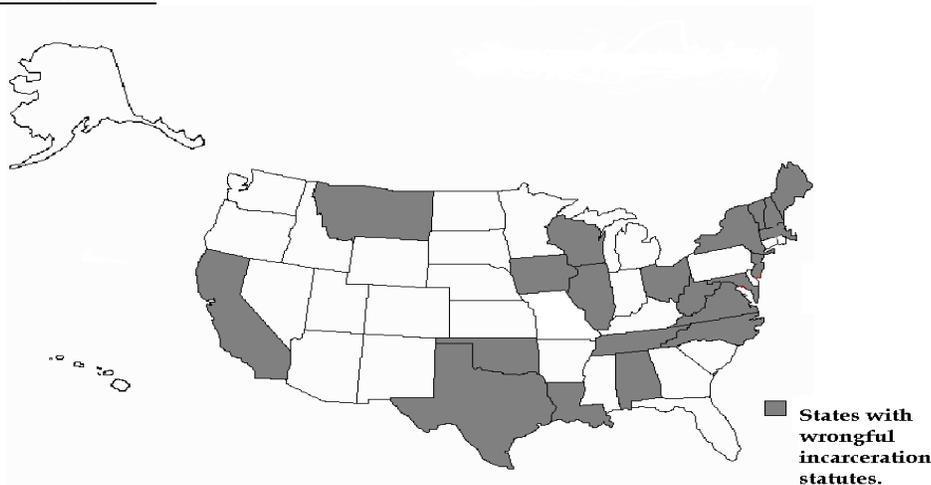
### Pending Claim Bills for Luis Diaz

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



Committee on The Special Master on Claim Bills. *See* CS/CS/HB 125 (2007); SB 50 (2007).

<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.

### ***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> 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 process under which a person who was convicted and incarcerated for a felony of which he or she was actually innocent, or for which a jury would have likely found the defendant not guilty due to exonerating evidence, may apply for compensation from the state.

### **Finding of Wrongful Incarceration**

Upon entry of an order vacating a conviction and sentence, a defendant may petition the court for a determination whether he or she qualifies as a "wrongfully incarcerated person."<sup>38</sup> The court must set forth in detail the evidence supporting its findings.

<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.

<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 crime, nor did he or she aid, abet, or act as an accomplice or accessory to the person who

Although it sets forth a clear and convincing standard, the bill suggests that the standard may apply to the court's decision to vacate a conviction and sentence rather than the court's determination whether the person meets the definition of a "wrongfully incarcerated person." The Legislature may wish to clarify that the clear and convincing standard applies only to the court's determination whether the person qualifies as a wrongfully incarcerated person for purposes of the compensation program. Currently, the standard for vacating or setting aside a conviction and sentence on the basis of newly discovered evidence is that the newly discovered evidence must be of such nature that it would "probably produce an acquittal on retrial."<sup>39</sup> This burden is met if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."<sup>40</sup>

The bill also appears to contemplate that a person seeking compensation will secure a determination whether he or she satisfies the definition of a "wrongfully incarcerated person" upon petition, but the bill does not prescribe the process for securing that finding and order. It is unknown whether a determination as to eligibility as a wrongfully incarcerated person would occur simultaneously upon release or whether a person would petition the court subsequent to his or her release. The timing of when the order is secured is relevant because, under the terms of the bill, a person is not eligible for compensation if he or she submits a completed application for compensation more than two years after the court's determination whether the person qualifies as a wrongfully incarcerated person.

A wrongfully incarcerated person whose sentence was vacated prior to the effective date of this bill may petition the court for a determination of whether the person is a wrongfully incarcerated person. The wrongfully incarcerated person must give reasonable notice in writing to the prosecuting authority upon petitioning for a determination of wrongful incarceration. The wrongfully incarcerated person released prior to the effective date of the bill must file a petition for a determination by October 1, 2010.

### **Compensation for Wrongful Incarceration**

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 using the Consumer Price Index beginning January 1, 2009.
- **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

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committed the offense or, due to the discovery of exonerating evidence that is so probative of innocence, the court determines that a jury likely would have found the defendant not guilty had it known of the existence of exonerating evidence.

<sup>39</sup> *Preston v. State*, 970 So. 2d 789, 797 (Fla. 2007). The defendant must also prove that the court or his counsel did not know of the existence of the evidence at the time of trial, and that the evidence could not have been discovered with reasonable diligence. *Id.*

<sup>40</sup> *Id.* (quoting *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998)).

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>41</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.

### **Eligibility for Compensation**

A wrongfully incarcerated person is ineligible for compensation under the bill if, prior to his or her wrongful conviction and incarceration, the person was designated as a violent career criminal pursuant to s. 775.084, F.S.<sup>42</sup> It is unclear whether a felony conviction encompasses the commission of a felony during incarceration resulting from the wrongful conviction.

A wrongfully incarcerated person is also ineligible if the person files his or her application more than two years after a court determination of whether the person satisfies the definition of a "wrongfully incarcerated person."

### **Application Process**

A wrongfully incarcerated person must submit an application to the Chief Financial Officer (CFO) for compensation and benefits available under the program. The application must include:

- A certified copy of the order finding the claimant to be a wrongfully incarcerated person;
- Certified copies of the original judgment and sentence;
- Documentation demonstrating the length of sentence served, including Department of Corrections documentation;
- Positive proof of identification, including fingerprints and photo identification;

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<sup>41</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>42</sup> To be sentenced as a "violent career criminal" under s. 775.084(1)(d), F.S., a defendant must have been previously incarcerated in state or federal prison, must have been convicted three times as an adult of certain violent felonies listed in the statute, and must have committed the offense while incarcerated or under supervision, or within five years of the most recent conviction or release from prison. *State v. Hearn*, 961 So. 2d 211, 214 (Fla. 2007). The felonies that qualify for designation as a violent career criminal under s. 775.084(1)(d)1., F.S., are:

- a. Any forcible felony, as described in s. 776.08, F.S.;
- b. Aggravated stalking;
- c. Aggravated child abuse;
- d. Aggravated abuse of an elderly person;
- e. Lewd, lascivious, or indecent conduct;
- f. Escape; or
- g. A felony violation of ch. 790, F.S., involving the use or possession of a firearm.

- Documentation maintained by the Department of Law Enforcement related to the person's criminal history; and
- Any other documentation or information required by rules adopted by the Department of Financial Services relating to the application process.

The Legislature may wish to consider requiring the submission of a certified copy of the order vacating the conviction and sentence with the application.

The bill establishes a 90-day timeframe for review and processing of the application. The applicant is afforded 30 days to cure any errors or omissions in the application prior to a denial of the application by the CFO. Thereafter, the CFO may not deny an application for errors or omissions unless the CFO timely notified the claimant of the errors or omissions within 30 days of receipt of the application. Upon the determination that the claim for compensation meets the requirements of the act, the CFO shall notify the claimant within five business days, and payment must be made 30 days after notice of approval is provided to the claimant.

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>43</sup>

### **Payment of Compensation**

Payment is to be made to the claimant in one lump-sum payment from the General Revenue Fund or any other available state funds.

Prior to receiving the lump-sum 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.

### **Rule-Making Authority**

The bill provides rule-making authority to the DFS, on behalf of the CFO, regarding forms and procedures related to applications for compensation. Under the Florida Administrative Procedure Act (APA), no agency has inherent rule-making authority, and administrative bodies must derive that power from a statutory base.<sup>44</sup> This enabling provision is likely necessary in order for the agency to properly administer the application process as required under the act.

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<sup>43</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>44</sup> *Grove Isle, Ltd. v. State Dept. of Environmental Regulation*, 454 So. 2d 571, 573 (Fla. 1st DCA 1984).

### **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>45</sup>

### **Effective Date**

The bill takes effect on October 1, 2008.

### **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:**

This bill creates a process to compensate persons who were convicted and incarcerated for a felony for which they were actually innocent, or for which the court determines that, due to exonerating evidence, a jury would have found the defendant not guilty, in an amount of \$50,000 per year of imprisonment plus a tuition waiver.

#### **C. Government Sector Impact:**

The Department of Financial Services on behalf of the Chief Financial Officer reports that it will incur expenditures in the amount of \$68,633 for FY 08-09, \$65,959 for FY 09-

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<sup>45</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).

010, and \$67,725 for FY 010-011 related to the administration of the compensation program for wrongful incarceration.

The bill specifies that compensation shall be paid from the General Revenue Fund or any other available state funds. The bill does not include an 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>46</sup> However, not all of them may qualify for compensation.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**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 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.

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<sup>46</sup> See note 3, *supra*. Wilton Dedge, one of the nine persons, was compensated by the Legislature under ch. 2005-354, L.O.F.

- 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.

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

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