

---

# **Safety & Security Council**

**Wednesday, March 12, 2008  
3:10 p.m. – 3:30 p.m.  
102 House Office Building, Reed Hall**

**Marco Rubio  
Speaker**

**Dick Kravitz  
Chair**



# **The Florida House of Representatives**

## **Safety & Security Council**

**Marco Rubio**  
Speaker

**Dick Kravitz**  
Chair

**March 12, 2008**

### **AGENDA**

**2:10 p.m. – 3:30 p.m.**

**102 House Office Building, Reed Hall**

- I. Call Meeting to Order**
- II. Roll Call**
- III. Opening Comments**
- IV. Consideration of the following bills**
  - HB 321 Murder of Law Enforcement Officers by Rep. Snyder**
  - HB 435 Trust Administration by Rep. Hukill**
  - HB 537 Offense of Voyeurism by Rep. Dorworth**
  - HB 799 Theft of Copper or Other Nonferrous Metals  
by Rep. Adams**
  - HB 1025 Compensation for Wrongful Incarceration  
by Rep. Bogdanoff**
  - PCB SSC 08-02 Federal Grants Trust Fund in the Parole  
Commission**
  - PCB SSC 08-03 Shared County/State Juvenile Detention Trust  
Fund in the Department of Juvenile Justice**
- V. Closing Remarks**
- VI. Adjournment**



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 321 Murder of Law Enforcement Officers

SPONSOR(S): Snyder and others

TIED BILLS: IDEN./SIM. BILLS: SB 1064

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Homeland Security &amp; Public Safety</u>	<u>10 Y, 0 N</u>	<u>Cunningham</u>	<u>Kramer</u>
2) <u>Safety &amp; Security Council</u>	<u></u>	<u>Cunningham <i>SM</i></u>	<u>Havlicak <i>RH</i></u>
3) <u>Policy &amp; Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Currently, the Law Enforcement Protection Act provides penalty enhancements for violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.

HB 321 creates s. 782.065, F.S., which provides that a person who commits or attempts to commit murder in the first, second, or third degree, or attempted felony murder, where the victim of the offense was a law enforcement officer, part-time law enforcement officer, or auxiliary law enforcement officer, engaged in the lawful performance of a legal duty shall, if the death sentence is not imposed, be sentenced to a minimum mandatory term of imprisonment for life without eligibility for release.

On January 17, 2008, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact.

This bill takes effect October 1, 2008.

## FULL ANALYSIS

### SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Promote Person Responsibility – This bill creates s. 782.065, F.S., which provides minimum mandatory penalties for persons who commit or attempt to commit murder in the first, second, or third degree, or attempted felony murder, where the victim of the offense was a law enforcement officer, part-time law enforcement officer, or auxiliary law enforcement officer, engaged in the lawful performance of a legal duty.

#### B. EFFECT OF PROPOSED CHANGES:

The Law Enforcement Protection Act<sup>1</sup> (Act), when read in conjunction with the Criminal Punishment Code, provides penalty enhancements for violent offenses<sup>2</sup> committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges. The following chart illustrates the permissible sentence ranges for violent offenses committed against law enforcement officers pursuant to the Act's penalty enhancements.

OFFENSE	PENALTY RANGE
1st Degree Murder	Life without eligibility for release
2nd Degree Murder	
s. 782.04(2)	53.875 years - life
s. 782.04(3)	50.125 years - life
3rd Degree Murder	22.5 years
Attempted 1st Degree Murder	12.625 years - 30 years
Attempted 2nd Degree Murder	
s. 782.04(2)	9.75 years - 15 years
s. 782.04(3)	7.5 years - 15 years
Attempted Felony Murder	
s. 782.051(1)	12.625 years - life
s. 782.051(2)	9.8125 years - 30 years
s. 782.051(3)	7 - 15 years

#### *Effect of the Bill*

HB 321 creates s. 782.065, F.S., which provides minimum mandatory penalties for certain crimes against law enforcement officers. Specifically, the bill provides that notwithstanding the Act, a person who commits or attempts to commit murder in the first, second, or third degree, or attempted felony murder, where the victim of the offense was a law enforcement officer (LEO), part-time LEO, or auxiliary LEO, engaged in the lawful performance of a legal duty shall, if the death sentence is not imposed, be sentenced to a minimum mandatory term of imprisonment for life without eligibility for release. Thus, the penalty for every crime listed in the above chart would be life without eligibility for release.

#### C. SECTION DIRECTORY:

**Section 1.** Creates s. 782.065, F.S., relating to murder; law enforcement officer.

**Section 2.** This bill takes effect October 1, 2008.

<sup>1</sup> s. 775.0823, F.S.

<sup>2</sup> The violent offenses include: murder in the first degree, attempted murder in the first degree, attempted felony murder, murder in the second degree, attempted murder in the second degree, murder in the third degree, attempted murder in the third degree, manslaughter during the commission of a crime, kidnapping, aggravated battery, and aggravated assault.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

---

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

On January 17, 2008, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### D. STATEMENT OF THE SPONSOR

This bill, should it become law, will send a clear message and provide a deterrent to those who willingly attempt to murder a law enforcement officer in Florida. It is incumbent upon us as a legislative body to protect, as much as possible, those who protect us.

## IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On February 6, 2008, the Homeland Security & Public Safety Committee adopted a strike-all amendment and reported the bill favorably as amended. The amendment reorganizes the bill and makes technical changes.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

A bill to be entitled  
An act relating to murder of law enforcement officers;  
creating s. 782.065, F.S.; providing a minimum mandatory  
sentence for certain offenses; providing an effective  
date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 782.065, Florida Statutes, is created  
to read:

782.065 Murder; law enforcement officer.--Notwithstanding  
s. 775.0823, a person who commits or attempts to commit murder  
in the first, second, or third degree as described in s. 782.04,  
or attempted felony murder as described in s. 782.051, where the  
victim of the offense was a law enforcement officer, part-time  
law enforcement officer, or auxiliary law enforcement officer,  
as those terms are defined in s. 943.10, engaged in the lawful  
performance of a legal duty shall, if the death sentence is not  
imposed, be sentenced to a minimum mandatory term of  
imprisonment for life without eligibility for release.

Section 2. This act shall take effect October 1, 2008.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. 321

COUNCIL/COMMITTEE ACTION

ADOPTED  (Y/N)  
 ADOPTED AS AMENDED  (Y/N)  
 ADOPTED W/O OBJECTION  (Y/N)  
 FAILED TO ADOPT  (Y/N)  
 WITHDRAWN  (Y/N)  
 OTHER \_\_\_\_\_

*Traveling Amendment  
No Action Required*

Council/Committee hearing bill: Homeland Security & Public Safety  
Representative Snyder offered the following:

**Amendment**

Remove everything after the enacting clause and insert:

Section 1. Section 782.065, Florida Statutes, is created  
to read:

782.065 Murder; law enforcement officer.--Notwithstanding  
s. 775.082, s. 775.0823, s. 782.04, s. 782.051, and chapter 921,  
a defendant shall be sentenced to life imprisonment without  
eligibility for release upon findings by the factfinder beyond a  
reasonable doubt that:

(1) The defendant committed murder in the first degree in  
violation of s. 782.04(1) and a death sentence was not imposed;  
murder in the second or third degree in violation of s.  
782.04(2), (3), or (4); attempted murder in the first or second  
degree in violation of s. 782.04(1)(a)1. or (2); or attempted  
felony murder in violation of s. 782.051; and

(2) The victim of any offense described in subsection (1)  
is a law enforcement officer, part-time law enforcement officer,



HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

21 or auxiliary law enforcement officer, as those terms are defined  
22 in s. 943.10, engaged in the lawful performance of a legal duty.

23 Section 2. This act shall take effect October 1, 2008.

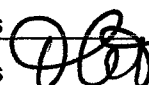
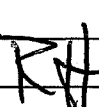
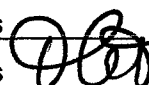
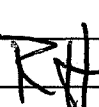
**HB 435**

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 435 Trust Administration

**SPONSOR(S):** Hukill

**TIED BILLS:** IDEN./SIM. BILLS: SB 2164

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution &amp; Civil Law</u>	<u>7 Y, 0 N</u>	Thomas 	Birtman 
2) <u>Safety &amp; Security Council</u>		Thomas 	Havlicak 
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

**SUMMARY ANALYSIS**

The Trust Code is the portion of the Florida Statutes that pertains to the administration of trusts.

The bill provides that when a grantor appoints trustees for particular purposes, the trustees excluded from those purposes are not liable for any consequence that results from compliance with the exercise of those purposes, regardless of the information available to the excluded trustees. The trustees having the power for a particular purpose shall be liable to the beneficiaries with respect to the exercise of that purpose.

The bill permits a trustee to use trust assets, without prior court approval, to pay costs or attorney's fees in any trust proceeding, including to defend against an allegation of breach of trust. However, when a claim or defense is made against the trustee based upon a breach of trust, if the party making the allegation shows a reasonable basis for the court to conclude that a breach of trust has in fact occurred, the court may enter an order prohibiting the trustee from using trust assets to pay costs or attorney's fees, and may order a refund.

The bill revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust. The bill provides that all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years from the date that the trust terminates, the trustee resigns or the fiduciary relationship between the trustee and the beneficiary otherwise ends; or
- Twenty years after the date of the act or omission of the trustee that is complained of.

This bill does not appear to have a fiscal impact on state or local government.

The bill takes effect on July 1, 2008.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may affect families who use trust instruments in dealing with personal property.

Safeguard individual liberty -- This bill affects the options of an individual, organization or association regarding the conduct of his/her own affairs using trust instruments.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

The Trust Code is the portion of the Florida Statutes that pertains to the administration of trusts. Florida's body of statutory law specific to trusts is found in ch. 736, F.S., and encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. This chapter sets forth the default rules for trust administration which can be limited or altered by the grantor (creator of the trust) in the trust instrument. Trust provisions in statute are also supplemented by case law in areas such as requirements for trust creation, treatment of revocable trusts, and rights of creditors.

Florida's Trust Code is modeled on the Uniform Trust Code of 2000. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000 and it has been enacted in some form in 18 states and the District of Columbia. In Florida, the Ad Hoc Trust Code Revision Committee (the committee) of the Florida Bar reviewed and revised the UTC to account for distinctions found in Florida statutory and case law. The product of the committee's work was the basis or the new Florida Trust Code adopted in 2006.<sup>1</sup>

A trust is generally defined as:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.<sup>2</sup>

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."<sup>3</sup> The term "trustee" as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another.<sup>4</sup> "Trustee" includes "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."<sup>5</sup>

<sup>1</sup> Chapter 2006-217, L.O.F.

<sup>2</sup> 55A Fla. Jur. 2d Trusts s. 1.

<sup>3</sup> Section 731.201(19), F.S.

<sup>4</sup> 90 C.J.S. Trusts s. 2.

<sup>5</sup> Section 731.201(38), F.S.

## Cotrustees

A trust may comprise a variety of liquid and non-liquid assets. A trustee may be a natural person or may be a financial institution. A trustee may be selected for their expertise in fiduciary administration, family governance or management of a diversified portfolio of securities. The expertise of the trustee may be limited, however, when it comes to managing unique assets such as a family business, real estate or large blocks of stock that cannot be easily diversified. Management of these types of assets may require a different skill set.

Clients sometimes wish to appoint a particular trustee for a trust but also want to have a cotrustee, adviser, or committee (not the trustee) control certain trust decisions. For example, if a grantor funds a trust with stock in the family company, he or she might want to continue to make decisions regarding the purchase, sale, and voting of such stock. Similarly, a family that has a long-standing relationship with a successful money manager might want that manager (not the trustee) to make investment decisions for trust assets. In addition, a client might want someone other than the trustee to decide when to make income or principal distributions to beneficiaries. In these situations, the client wants to minimize the trustee's involvement in such decisions.

~~Even if a trust directs the trustee to make investments or distributions on the direction of someone else and relieves it from liability for following such directions, the trustee might have considerable monitoring or other responsibilities and may be subject to potential liability. Under present Florida law, the trustee still has the responsibility to oversee, monitor and intervene to avoid a serious breach of trust by the advisor. Florida law provides that when a grantor of a trust confers "on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power *unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust* (emphasis added)."~~<sup>6</sup>

The bill amends s. 736.0703, F.S., to provide that when the grantor appoints trustees for particular purposes:

- an excluded trustee<sup>7</sup> must act in accordance with the exercise of the power given to the included trustee;
- an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power given to the included trustee, regardless of the information available to the excluded trustee;
- an excluded trustee is relieved from any obligation to review, inquire, investigate or make recommendations or evaluations with respect to the exercise of the power by the included trustee, regardless of any information available to the excluded trustee and regardless of any actual knowledge by the excluded trustee; and
- a trustee having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office, and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

<sup>6</sup> Section 736.0808(2), F.S.

<sup>7</sup> The "excluded trustee" is the trustee not assigned the specific power or purpose at issue.

## Duty of Loyalty

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.<sup>8</sup> In the absence of a contrary provision in the trust instrument, a court order,<sup>9</sup> or a specific statutory exception, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests, is voidable by an affected beneficiary.<sup>10</sup> A trustee may not usurp an opportunity properly belonging to the trust.<sup>11</sup> In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.<sup>12</sup>

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business<sup>13</sup> or personal ties<sup>14</sup> to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.<sup>15</sup> Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.

The Trust Code includes several exceptions to the basic duty of loyalty in the interest of fair, effective, and efficient trust administration. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;<sup>16</sup>
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;<sup>17</sup>
- A deposit of trust money in a regulated financial-service institution operated by the trustee;<sup>18</sup>
- An advance by the trustee of money for the protection of the trust;<sup>19</sup> or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.<sup>20</sup>

<sup>8</sup> See generally, s. 736.0802(1), F.S.

<sup>9</sup> A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction. Section 736.0802(9), F.S.

<sup>10</sup> Section 736.0802(2), F.S.

<sup>11</sup> Section 736.0802(4), F.S.

<sup>12</sup> Section 736.0802(6), F.S.

<sup>13</sup> Section 736.0802(3)(c) and (d), F.S. This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment.

<sup>14</sup> Section 736.0802(3)(a) and (b), F.S. This includes the trustee's spouse and the trustee's descendants, siblings, parents, or the spouse of any of them.

<sup>15</sup> Section 736.0802(3), F.S.

<sup>16</sup> Section 736.0802(7)(a) and (b), F.S.

<sup>17</sup> Section 736.0802(7)(c), F.S.

<sup>18</sup> Section 736.0802(7)(d), F.S.

<sup>19</sup> Section 736.0802(7)(e), F.S.

<sup>20</sup> Section 736.0802(8), F.S.

The Trust Code empowers a trustee to pay costs or attorney fees incurred in any trust proceeding from trust assets without the approval of any person or a court, except prior court approval is required if an action has been filed, or defense asserted, against the trustee based upon a breach of trust.<sup>21</sup> Prior court approval is not required "if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust."<sup>22</sup> The courts have held that when the personal interests of a trustee conflict with his or her position as trustee in the defense of an action, the trustee must obtain court approval before using trust funds to pay attorney's fees from trust assets.<sup>23</sup>

The bill amends s. 736.0802(10), F.S., to remove the requirement on a trustee to seek prior court approval to pay costs or attorney's fees to defend against an allegation of breach of trust. The bill will permit the trustee to use trust assets, without prior court approval, to pay costs or attorney's fees in any trust proceeding, including to defend against an allegation of breach of trust. However, when a claim or defense is made against the trustee based upon a breach of trust, if the party making the allegation shows a reasonable basis for the court to conclude that a breach of trust has in fact occurred, the bill provides that the court may enter an order prohibiting the trustee from using trust assets to pay costs or attorney's fees. The party making the allegation of breach of trust may do so by evidence in the record or by proffering evidence to the court that a breach of trust has occurred. The trustee may proffer evidence that rebuts the allegation. The new language provides that it does not restrict the remedies a court may employ to remedy a breach of trust, including ordering appropriate refunds.

### Limitations on Proceedings Against Trustees

The Trust Code specifies time limitations on bringing claims by a beneficiary against a trustee for breach of trust.<sup>24</sup> With respect to matters adequately disclosed on a trust accounting, the applicable limitation period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting. The shortest limitation period provided is six months. This period applies to actions on matters the trustee has adequately disclosed in a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.<sup>25</sup> A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.<sup>26</sup>

A significantly longer limitation period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. The Trust Code provides that the claims are barred as provided in chapter 95, F.S.<sup>27</sup> Typically, this will result in a four-year limitation with the period beginning on the date of receipt of the adequate disclosure.<sup>28</sup> An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the action must be commenced within 12 years, however the limitation period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.<sup>29</sup>

The bill provides that when "a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with

<sup>21</sup> Section 736.0802(10) F.S.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Shriner v. Dyer*, 462 So.2d 1122 (Fla. 4th DCA 1984); *Brigham v. Brigham*, 934 So.2d 544 (Fla. 3d DCA 2006); and *J.P. Morgan Trust Co. v. Siegel*, 965 So.2d 1193 (Fla. 4th DCA 2007).

<sup>24</sup> Section 736.1008, F.S.

<sup>25</sup> Section 736.1008(2), F.S.

<sup>26</sup> Section 736.1008(4)(c), F.S.

<sup>27</sup> Section 736.1008(1)(a), F.S.

<sup>28</sup> See s. 95.11(3), F.S.

<sup>29</sup> Section 95.031(2)(a), F.S.

respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document accrues when the beneficiary has actual knowledge of the facts upon which the claim is based and the trustee's repudiation of the trust, or adverse possession of trust assets, and is barred as provided in chapter 95." [The change to current law is underlined in the preceding sentence.]

The bill further provides that notwithstanding the present limitations in law as discussed above, all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years from the date that the trust terminates, the trustee resigns or the fiduciary relationship between the trustee and the beneficiary otherwise ends; or
- Twenty years after the date of the act or omission of the trustee that is complained of.

Finally, the bill provides that the failure of the trustee to take corrective action shall not be construed as a separate act or omission and shall not be construed to extend the period of limitation.

---

### Effective Date

The bill takes effect July 1, 2008.

### C. SECTION DIRECTORY:

Section 1: Amends s. 736.0703, F.S., relating to cotrustees.

Section 2: Amends s. 736.0802, F.S., relating to the duty of loyalty by trustees.

Section 3: Amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 4: Provides that the bill becomes effective on July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.



C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 5, 2008, the Committee on Constitution & Civil Law recommended a strike-all amendment that picks up the Senate version of the bill. The amendment provides:

**Section 1:** The amendment creates a new section of law to provide that communications between a fiduciary, who administers fiduciary property, and a lawyer are privileged (identical to the existing attorney/client privilege). The new privilege applies to a fiduciary when serving as:

- a personal representative (Probate) or a trustee (Trust Code) as defined in s. 731.201,
- an administrator ad litem (Probate) as described in s. 733.308,
- a curator (Probate) as described in s. 733.501,
- a guardian or guardian ad litem (Guardianship) as defined in s. 744.102,
- a conservator (Transfer of Property to Minors) as defined in s. 710.102, or
- an attorney in fact (Powers of Attorney) as described in chapter 709.

**Section 2 and Section 3:** - These two sections of the amendment are identical in substance to section 1 and section 2 of the bill as filed – with some slight change in wording made by Senate Bill Drafting.

**Section 4:** Revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust.

The first change made by the amendment, made in subsection (3), provides that when a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in ch. 95, F.S., and accrues when the beneficiary has actual knowledge of:

1. The facts upon which the claim is based, provided that such actual knowledge is established by clear and convincing evidence; or
2. The trustee's repudiation of the trust or adverse possession of trust assets.

---

The next changes made by the amendment, made in subsection (6), provide that notwithstanding the limitations provided elsewhere in the section, all claims by a beneficiary against a trustee for breach of trust are barred:

1. Upon the later of:
  - a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends, provided that the beneficiary had actual knowledge of the existence of the trust during the ten-year period; or
  - b. Twenty years after the date of the act or omission of the trustee that is complained of, provided that the beneficiary had actual knowledge of the existence of the trust during the twenty-year period; or
2. Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

For the purposes of the changes made by the amendment to subsection (6), failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established in the subsection.

The provisions of this section of the amendment, made to both subsection (3) and subsection (6), will apply only to claims based upon acts or omissions occurring on or after July 1, 2008.

The amendment does not have a fiscal impact on state or local governments.

1                               A bill to be entitled  
 2           An act relating to trust administration; amending s.  
 3           736.0703, F.S.; providing exceptions to duties and  
 4           liabilities of cotrustees for excluded cotrustees under  
 5           certain circumstances; providing for liabilities and  
 6           obligations of included cotrustees; amending s. 736.0802,  
 7           F.S.; providing an exception for trustee payments of costs  
 8           and attorney's fees from trust assets except pursuant to  
 9           court order under certain circumstances; providing  
 10          requirements for obtaining such a court order; preserving  
 11          certain court remedies; amending s. 736.1008, F.S.;  
 12          specifying periods of repose barring claims by a  
 13          beneficiary against a trustee; providing construction;  
 14          providing an effective date.

15  
 16   Be It Enacted by the Legislature of the State of Florida:

17  
 18          Section 1. Subsection(7) of section 736.0703, Florida  
 19          Statutes, is amended, and subsection (9) is added to that  
 20          section, to read:

21                736.0703 Cotrustees.--

22                (7) Except as otherwise provided in subsection (9), each  
 23          cotrustee shall exercise reasonable care to:

- 24                (a) Prevent a cotrustee from committing a breach of trust.
- 25                (b) Compel a cotrustee to redress a breach of trust.

26                (9) If the terms of a trust instrument provide for the  
 27          appointment of more than one trustee but confer upon one or more  
 28          of the trustees, to the exclusion of the others, the power to

29 direct or prevent specified actions of the trustees, the  
 30 excluded trustees shall act in accordance with the exercise of  
 31 the power. An excluded trustee is not liable, individually or as  
 32 a fiduciary, for any consequence that results from compliance  
 33 with the exercise of the power, regardless of the information  
 34 available to the excluded trustees. The excluded trustees are  
 35 relieved of any obligation to review, inquire, investigate, or  
 36 make recommendations or evaluations with respect to the exercise  
 37 of the power. The trustee or trustees having the power to direct  
 38 or prevent actions of the trustees shall be liable to the  
 39 beneficiaries with respect to the exercise of the power as if  
 40 the excluded trustees were not in office and shall have the  
 41 exclusive obligation to account to and to defend any action  
 42 brought by the beneficiaries with respect to the exercise of the  
 43 power.

44 Section 2. Subsection (10) of section 736.0802, Florida  
 45 Statutes, is amended to read:

46 736.0802 Duty of loyalty.--

47 (10) Payment of costs or attorney's fees incurred in any  
 48 trust proceeding from the assets of the trust may be made by the  
 49 trustee without the approval of any person and without court  
 50 authorization, unless the court orders otherwise as provided in  
 51 paragraph (a). ~~except that court authorization shall be required~~  
 52 ~~if an action has been filed~~

53 (a) If a claim or defense asserted against the trustee  
 54 based upon a breach of trust is made against the trustee in a  
 55 trust proceeding, a party must obtain a court order to prohibit  
 56 the trustee from paying costs or attorney's fees from trust

57 assets. To obtain an order prohibiting payment of costs or  
 58 attorney's fees from trust assets, a party must make a  
 59 reasonable showing by evidence in the record or by proffering  
 60 evidence that provides a reasonable basis for a court to  
 61 conclude that there has been a breach of trust. The trustee may  
 62 proffer evidence to rebut the evidence submitted by a party.

63 (b) Nothing in this subsection is intended to restrict the  
 64 remedies a court may employ to remedy a breach of trust,  
 65 including, but not limited to, ordering appropriate refunds.  
 66 ~~Court authorization is not required if the action or defense is~~  
 67 ~~later withdrawn or dismissed by the party that is alleging a~~  
 68 ~~breach of trust or resolved without a determination by the court~~  
 69 ~~that the trustee has committed a breach of trust.~~

70 Section 3. Subsection (3) of section 736.1008, Florida  
 71 Statutes, is amended, subsection (6) of that section is  
 72 renumbered as subsection (7), and new subsection (6) is added to  
 73 that section, to read:

74 736.1008 Limitations on proceedings against trustees.--

75 (3) When a trustee has not issued a final trust accounting  
 76 or has not given written notice to the beneficiary of the  
 77 availability of the trust records for examination and that  
 78 claims with respect to matters not adequately disclosed may be  
 79 barred, a claim against the trustee for breach of trust based on  
 80 a matter not adequately disclosed in a trust disclosure document  
 81 accrues when the beneficiary has actual knowledge of the facts  
 82 upon which the claim is based and the trustee's repudiation of  
 83 the trust or adverse possession of trust assets, and is barred  
 84 as provided in chapter 95.

85 (6)(a) Notwithstanding subsections (1), (2), and (3), all  
 86 claims by a beneficiary against a trustee are barred upon the  
 87 later of:

88 1. Ten years after the date the trust terminates, the  
 89 trustee resigns, or the fiduciary relationship between the  
 90 trustee and the beneficiary otherwise ends; or

91 2. Twenty years after the date of the act or omission of  
 92 the trustee that is complained of.

93 (b) For purposes of this subsection, the failure of the  
 94 trustee to take corrective action shall not be construed as a  
 95 separate act or omission and shall not be construed to extend  
 96 the period of repose established by this subsection.

97 Section 4. This act shall take effect July 1, 2008.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. HB 435

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
 ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
 ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
 FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
 WITHDRAWN \_\_\_\_\_ (Y/N)  
 OTHER \_\_\_\_\_

*Traveling Amendment  
No Action Required*

1 Council/Committee hearing bill: Committee on Constitution &  
 2 Civil Law

3 Representative Hukill offered the following:

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Section 90.5021, Florida Statutes, is created to read:

90.5021 Fiduciary lawyer-client privilege.--

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in s. 731.201, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a communication under this

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

22 section, only the person or entity acting as a fiduciary is  
23 considered a client of the lawyer.

24 Section 2. Subsection (7) of section 736.0703, Florida  
25 Statutes, is amended, and subsection (9) is added to that  
26 section, to read:

27 736.0703 Cotrustees.--

28 (7) Except as otherwise provided in subsection (9), each  
29 cotrustee shall exercise reasonable care to:

30 (a) Prevent a cotrustee from committing a breach of trust.

31 (b) Compel a cotrustee to redress a breach of trust.

32 (9) If the terms of a trust instrument provide for the  
33 appointment of more than one trustee but confer upon one or more  
34 of the trustees, to the exclusion of the others, the power to  
35 direct or prevent specified actions of the trustees, the  
36 excluded trustees shall act in accordance with the exercise of  
37 the power. An excluded trustee is not liable, individually or as  
38 a fiduciary, for any consequence that results from compliance  
39 with the exercise of the power, regardless of the information  
40 available to the excluded trustees. The excluded trustees are  
41 relieved of any obligation to review, inquire, investigate, or  
42 make recommendations or evaluations with respect to the exercise  
43 of the power. The trustee or trustees having the power to direct  
44 or prevent actions of the trustees shall be liable to the  
45 beneficiaries with respect to the exercise of the power as if  
46 the excluded trustees were not in office and have the exclusive  
47 obligation to account to and defend any action brought by the  
48 beneficiaries with respect to the exercise of the power.

49 Section 3. Subsection (10) of section 736.0802, Florida  
50 Statutes, is amended to read:

51 736.0802 Duty of loyalty.--



HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

52 (10) Payment of costs or attorney's fees incurred in any  
53 trust proceeding from the assets of the trust may be made by the  
54 trustee without the approval of any person and without court  
55 authorization, unless the court orders otherwise as provided in  
56 paragraph (a). ~~except that court authorization shall be required~~  
57 ~~if an action has been filed~~

58 (a) If a claim or defense asserted against the trustee  
59 based upon a breach of trust is made against the trustee in a  
60 trust proceeding, a party must obtain a court order to prohibit  
61 the trustee from paying costs or attorney's fees from trust  
62 assets. To obtain an order prohibiting payment of costs or  
63 attorney's fees from trust assets, a party must make a  
64 reasonable showing by evidence in the record or by proffering  
65 evidence that provides a reasonable basis for a court to  
66 conclude that there has been a breach of trust. The trustee may  
67 proffer evidence to rebut the evidence submitted by a party.

68 (b) This subsection does not restrict the remedies a court  
69 may employ to remedy a breach of trust, including, but not  
70 limited to, ordering appropriate refunds. ~~Court authorization is~~  
71 ~~not required if the action or defense is later withdrawn or~~  
72 ~~dismissed by the party that is alleging a breach of trust or~~  
73 ~~resolved without a determination by the court that the trustee~~  
74 ~~has committed a breach of trust.~~

75 Section 4. Subsection (3) of section 736.1008, Florida  
76 Statutes, is amended, present subsection (6) of that section is  
77 renumbered as subsection (7), and new subsection (6) is added to  
78 that section, to read:

79 736.1008 Limitations on proceedings against trustees.--

80 (3) When a trustee has not issued a final trust accounting  
81 or has not given written notice to the beneficiary of the  
82 availability of the trust records for examination and that

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

83 claims with respect to matters not adequately disclosed may be  
84 barred, a claim against the trustee for breach of trust based on  
85 a matter not adequately disclosed in a trust disclosure document  
86 is barred as provided in chapter 95 and accrues when the  
87 beneficiary has actual knowledge of:

88 (a) The facts upon which the claim is based if such actual  
89 knowledge is established by clear and convincing evidence; or

90 (b) The trustee's repudiation of the trust or adverse  
91 possession of trust assets, and is barred as provided in chapter  
92 95.

93  
94 Paragraph (a) applies to claims based upon acts or omissions  
95 occurring on or after July 1, 2008.

96 (6) (a) Notwithstanding subsections (1), (2), and (3), all  
97 claims by a beneficiary against a trustee are barred:

98 1. Upon the later of:

99 a. Ten years after the date the trust terminates, the  
100 trustee resigns, or the fiduciary relationship between the  
101 trustee and the beneficiary otherwise ends if the beneficiary  
102 had actual knowledge of the existence of the trust during the  
103 10-year period; or

104 b. Twenty years after the date of the act or omission of  
105 the trustee that is complained of if the beneficiary had actual  
106 knowledge of the existence of the trust during the 20-year  
107 period or;

108 2. Forty years after the date the trust terminates, the  
109 trustee resigns, or the fiduciary relationship between the  
110 trustee and the beneficiary otherwise ends.

111 (b) For purposes of this subsection, the failure of the  
112 trustee to take corrective action is not a separate act or

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

113 omission and does not extend the period of repose established by  
114 this subsection.

115 (c) This subsection applies to claims based upon acts or  
116 omissions occurring on or after July 1, 2008.

117 Section 5. This act shall take effect July 1, 2008.

118

119

120

121

T I T L E A M E N D M E N T

122

Remove the entire title and insert:

123

124

An act relating to fiduciaries; creating s. 90.5021, F.S.;  
125 providing a fiduciary lawyer-client privilege for purposes of  
126 the Florida Evidence Code; providing that a communication  
127 between a lawyer and a client acting as a fiduciary is  
128 privileged and protected from disclosure; amending s. 736.0703,  
129 F.S.; providing exceptions to duties and liabilities of  
130 cotrustees for excluded cotrustees under certain circumstances;  
131 providing for liabilities and obligations of included  
132 cotrustees; amending s. 736.0802, F.S.; providing an exception  
133 for trustee payments of costs and attorney's fees from trust  
134 assets except pursuant to court order under certain  
135 circumstances; providing requirements for obtaining such a court  
136 order; preserving certain court remedies; amending s. 736.1008,  
137 F.S.; specifying when a claim accrues against a trustee for  
138 breach of trust based on a matter not adequately disclosed;  
139 providing for application; specifying periods of repose barring  
140 claims by a beneficiary against a trustee; providing for  
141 construction; providing for application; providing an effective  
142 date.

143

**HB 537**

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 537 Offense of Voyeurism

SPONSOR(S): Dorworth and others

TIED BILLS: IDEN./SIM. BILLS: SB 328

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Homeland Security &amp; Public Safety</u>	<u>10 Y, 0 N</u>	<u>Padgett</u>	<u>Kramer</u>
2) <u>Safety &amp; Security Council</u>	<u></u>	<u>Padgett</u> <i>PP</i>	<u>Havlicak</u> <i>RH</i>
3) <u>Policy &amp; Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Currently, s. 810.145, F.S. provides that a person who commits the offense of video voyeurism commits a first degree misdemeanor. If a person commits the offense of video voyeurism and has a prior conviction for video voyeurism, the person commits a third degree felony.

HB 537 amends s. 810.145, F.S., to create two new video voyeurism offenses. The bill makes video voyeurism a third degree felony in cases where the offender is 18 years of age or older and commits video voyeurism against:

- A child under 16 when the offender is responsible for the welfare of the victim
- A student at a K-12 school or private school at which the offender is employed

The bill also provides that the penalties for a violation of this subsection increase to a second degree felony if the offender has a prior conviction for video voyeurism.

The bill provides an effective date of July 1, 2008.

The Criminal Justice Impact Conference met on February 26, 2008 and determined this bill would have an insignificant prison bed impact.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Promote Personal Responsibility:** This bill increases criminal penalties for video voyeurism if the offender is at least 18 years old, responsible for the welfare of a child under 16, and commits video voyeurism against that child. Also, the bill increases the criminal penalties for video voyeurism if the person who commits the offense is over 18, employed at a school, and commits video voyeurism against a victim who is a student at that school. The bill also increases criminal penalties if a person commits this offense and has a previous conviction for video voyeurism.

#### B. EFFECT OF PROPOSED CHANGES:

---

##### Present Situation

Currently, s. 810.145, F.S. provides that a person commits video voyeurism by:

- Intentionally using or installing an imaging device to secretly view, broadcast, or record a person who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy, for the offender's own amusement, entertainment, sexual arousal, gratification, or profit or for the purpose of degrading or abusing another person.
- Intentionally permitting the use or installation of an imaging device to secretly view, broadcast, or record a person as stated above, but for the amusement entertainment, sexual arousal, gratification, or profit of another person.
- Intentionally using an imaging device to secretly view, broadcast, or record under or through another person's clothing in order to view that person's body or undergarments, for the amusement, entertainment, sexual arousal, gratification, or profit or for the purpose of degrading or abusing another person.

Section 810.145, F.S., also includes the offenses of video voyeurism dissemination and commercial video voyeurism dissemination for distributing a video or image with knowledge or reason to believe that it was created as a result of video voyeurism.

The statute includes exceptions to ensure that it does not criminalize law enforcement surveillance; video security systems, provided that written notice of the system is posted; or video surveillance systems which are clearly and immediately obvious. Also, the statute provides an exception for internet providers who do not exercise control over user content.

A violation of the provisions of s. 810.145, F.S. is a first degree misdemeanor, punishable by up to one year in jail and a \$1,000 fine. If an offender has previously been convicted or adjudicated delinquent for any violation of this section, the penalty is enhanced to a third degree felony, punishable by up to 5 years imprisonment and a \$5,000 fine.

##### Proposed Changes

HB 537 amends s. 810.145, F.S. to create two new video voyeurism offenses which are third degree felonies, punishable by up to 5 years imprisonment and a \$5,000 fine. The bill requires proof of all

elements of video voyeurism as currently defined in s. 810.145, F.S., plus additional elements which would result in the increased penalty.

The new s. 810.145(8)(a) F.S., creates a third degree felony if the offender commits video voyeurism and:

- The offender is 18 years of age or older,
- The victim is under the age 16, and
- The offender is responsible for the welfare of the victim.

The bill provides that the new offense may be proven regardless of whether the offender knew or had reason to know the age of the victim.

The new s. 810.145(8)(b), F.S., creates a third degree felony if the offender commits video voyeurism and:

- The offender is 18 years of age or older,
- The offender is employed at a K-12 school or private school, and
- The victim is a student of the school.

The bill also provides that if a person has previously been convicted or adjudicated delinquent of any form of video voyeurism, a violation of the new offenses in HB 537 would be punished as a second degree felony.

The new offenses created are not ranked in the offense severity ranking chart<sup>1</sup>. Sections 810.145(a) and (b) would default to a Level 1. Section 810.145(c) would default to a Level 4.

#### C. SECTION DIRECTORY:

Section 1 Amends s. 810.145, F.S., relating to video voyeurism.

Section 2 Provides effective date of July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

See fiscal comments.

---

<sup>1</sup> Section 921.0022, F.S.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

---

The Criminal Justice Impact Conference met on February 26, 2008 and determined this bill would have an insignificant prison bed impact.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**D. STATEMENT OF THE SPONSOR**

No statement submitted.



#### **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 5, 2008, the Committee on Homeland Security & Public Safety adopted one amendment to the bill. The amendment creates a third degree felony if the offender commits video voyeurism and:

- The offender is 24 years of age or older, and
- The victim is under the age of 16

The amendment provides that the new offense may be proven regardless of whether the offender knew or had reason to know the age of the victim.

---

A bill to be entitled

An act relating to the offense of voyeurism; amending s. 810.145, F.S.; providing that it is a third-degree felony for certain persons who are responsible for the welfare of a child younger than 16 years of age to commit the offense of video voyeurism, video voyeurism dissemination, or commercial video voyeurism dissemination against that child; providing criminal penalties; providing that it is a third-degree felony for a person employed at a school to commit the offense of video voyeurism, video voyeurism dissemination, or commercial video voyeurism dissemination against a student of the school; providing criminal penalties; providing that it is a second-degree felony for a person who was previously convicted of or adjudicated delinquent for video voyeurism, video voyeurism dissemination, or commercial video voyeurism dissemination to commit any such third-degree felony against a child younger than 16 years of age or a student; providing criminal penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (6) of section 810.145, Florida Statutes, is amended, present subsection (8) of that section is redesignated as subsection (9), and a new subsection (8) is added to that section, to read:

810.145 Video voyeurism.--

(6) Except as provided in subsections ~~subsection~~ (7) and

HB 537

2008

29 (8), a person who violates this section commits a misdemeanor of  
 30 the first degree, punishable as provided in s. 775.082 or s.  
 31 775.083.

32 (8) (a) A person 18 years of age or older who is  
 33 responsible for the welfare of a child younger than 16 years of  
 34 age, regardless of whether the person knows or has reason to  
 35 know the age of the child, and who commits an offense under this  
 36 section against that child commits a felony of the third degree,  
 37 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

38 (b) A person 18 years of age or older who is employed at a  
 39 private school as defined in s. 1002.01 or a school as defined  
 40 in s. 1003.01 and who commits an offense under this section  
 41 against a student of the school or private school commits a  
 42 felony of the third degree, punishable as provided in s.  
 43 775.082, s. 775.083, or s. 775.084.

44 (c) A person who violates this subsection and who has  
 45 previously been convicted of or adjudicated delinquent for any  
 46 violation of this section commits a felony of the second degree,  
 47 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

48 Section 2. This act shall take effect July 1, 2008.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. 537

COUNCIL/COMMITTEE ACTION

ADOPTED  (Y/N)  
 ADOPTED AS AMENDED  (Y/N)  
 ADOPTED W/O OBJECTION  (Y/N)  
 FAILED TO ADOPT  (Y/N)  
 WITHDRAWN  (Y/N)  
 OTHER \_\_\_\_\_

*Traveling Amendment  
No Action Required*

1 Council/Committee hearing bill: Homeland Security & Public Safety  
 2 Representative Snyder offered the following:

**Amendment**

On page 2, between lines 43 and 44 insert:

6 (d) A person 24 years of age or older who commits an  
 7 offence under this section against a child younger than 16 years  
 8 of age, regardless of whether the person knows or has reason to  
 9 know the age of the child, commits a felony of the third degree,  
 10 punishable as provided in s. 775.082, s. 775.083 or s. 775.084

(renumber subsequent subsections)

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2

Bill No. 537

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1 Council/Committee hearing bill: Safety & Security Council  
2 Representative(s) Dorworth offered the following:

3  
4 **Amendment**

5 Remove lines 38-43 and insert:

6 (b) A person 18 years of age or older who is employed at a  
7 private school as defined in s. 1002.01; a school as defined in  
8 s. 1003.01; or a voluntary prekindergarten education program in  
9 s. 1002.53(3)(a), s. 1002.53(3)(b), or 1002.53(3)(c) and who  
10 commits an offense under this section against a student of the  
11 private school, school, or voluntary prekindergarten education  
12 program commits a felony of the third degree, punishable as  
13 provided in s. 775.082, s. 775.083, or s. 775.084.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 799 Theft of Copper or Other Nonferrous Metals

SPONSOR(S): Adams and others

TIED BILLS: IDEN./SIM. BILLS: SB 1384

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Homeland Security & Public Safety	10 Y, 0 N	Padgett	Kramer
2) Safety & Security Council		Padgett <i>RP</i>	Havlicak <i>RA</i>
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

The bill creates s. 812.145, F.S. which provides that a person who knowingly and intentionally takes copper or other nonferrous metals from a utility or communications services provider commits a first degree felony if the theft:

- Damages the facilities of a utility of communications services provider, or
- Interrupts or interferes with utility service or communications services, or
- Interferes with the ability of a utility service or communications services provider to provide service

A first degree felony is punishable by up to 30 years in prison and a \$10,000 fine. The bill does not provide a ranking level for the newly created offense on the Offense Severity Ranking Chart. Per Florida law, an unranked first degree felony defaults to a level 7 offense for purposes of sentencing.

The bill has an effective date of October 1, 2008.

The Criminal Justice Impact Conference met on February 26, 2008 and determined this bill would have an insignificant prison bed impact.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility/Maintain Public Security: The bill creates s. 812.145, F.S. which provides a person commits a first degree felony if the person steals copper or other nonferrous metals from a utility or communications service provider and the theft causes damage or interrupts service.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Situation

Recently, there has been an increase in media reports of metal theft (specifically copper) from utilities, construction sites, citrus groves, air conditioner units, cell phone towers, and even a report of copper theft from an Amtrak locomotive. The reports state that thieves take the stolen metal to a secondary metals recycler and sell the metal for cash. Currently, scrap copper wire sells for up to \$3.19 per pound<sup>1</sup>.

The degrees of punishment under the current theft statute are primarily based upon the dollar value of the stolen property.<sup>2</sup> There are specific circumstances in which the dollar value threshold amounts which qualify for a higher level of punishment are altered or eliminated if a certain type of property<sup>3</sup> is stolen or if certain conditions occur related to the theft<sup>4</sup>. One of these circumstances provides that if a person causes damage to property in excess of \$1,000 during the course of the grand theft, the person commits a first degree felony. Under current Florida law, there is no distinction between the theft of copper and nonferrous metals from a utility and the theft of all other property.<sup>5</sup> As a result, absent one of the exceptions, the criminal penalties for theft of copper and nonferrous metals from a utility would be based on dollar value threshold amounts.

Regarding utilities, s. 812.14, F.S. currently provides that a person commits a first degree misdemeanor<sup>6</sup> if the person willfully alters, tampers with, injures, or knowingly suffers to be injured any meter, meter seal, pipe, conduit, wire, line, cable, transformer, or other apparatus or device belonging to a utility service as to cause loss or damage. There is no requirement that the damage cause an

<sup>1</sup> <http://www.scrapindex.com/metal/copper> (as of February 19, 2008).

<sup>2</sup> See generally, s. 821.012, F.S. If the stolen property is valued at \$100,000 or more, the offense is a first degree felony. If the stolen property is valued at between \$20,000 and \$100,00, the offense is a second degree felony. If the stolen property is valued at between \$300 and \$20,000, the offense is a third degree felony. If the stolen property is valued between \$100 and \$300, the offense is a first degree misdemeanor. If the stolen property is under \$100, the offense is a second degree misdemeanor.

<sup>3</sup> E.g. firearms, a will, a fire extinguisher, citrus fruit, a stop sign, emergency medical equipment, law enforcement equipment, etc.

<sup>4</sup> E.g. theft during a state of emergency, use of a motor vehicle, damage to property during the course of the theft, theft of cargo in interstate commerce, etc.

<sup>5</sup> Section 812.014, F.S.

<sup>6</sup> Punishable by up to one year in jail and a \$1,000 fine. Sections 775.082, 775.083, F.S.



interruption in service. Although the theft of utility lines appears to be punishable as a misdemeanor under 812.14, F.S., the main focus of s. 812.14, F.S. is the theft of utility services via unauthorized use and the damage caused by the unauthorized use rather than actual theft or damage of the utility lines themselves.

### Proposed Changes

The bill creates s. 812.145, F.S. which provides that a person who knowingly and intentionally takes copper or other nonferrous metals<sup>7</sup> from a utility<sup>8</sup> or communications services provider<sup>9</sup> commits a first degree felony if the theft:

- Damages the facilities of a utility or communications services provider, or
- Interrupts or interferes with utility service<sup>10</sup> or communications services<sup>11</sup>, or
- Interferes with the ability of a utility service or communications services provider to provide service.

The bill does not provide for a minimum dollar value threshold to make the theft of copper and other nonferrous metals punishable as a first degree felony when service is interrupted. Thus, all thefts which fall into this category are automatically punishable as first degree felonies.

A first degree felony is punishable by up to 30 years in prison and a \$10,000 fine<sup>12</sup>. The bill does not provide a ranking level for the newly created offense on the Offense Severity Ranking Chart<sup>13</sup>. Per Florida law, an unranked first degree felony defaults to a level 7 offense for purposes of sentencing.<sup>14</sup>

---

<sup>7</sup> The bill defines "copper or other nonferrous metals" as, "metals not containing significant quantities of iron or steel, including, without limitation, copper, copper alloy, copper utility or communications service wire, brass, aluminum, bronze, lead, zinc, nickel, and alloys thereof."

<sup>8</sup> Utility is defined by the bill as having the same meaning as in s. 812.14, F.S.; "any person, firm, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas, electricity, heat, water, oil, sewer service, telephone service, telegraph service, radio service, or telecommunication service."

<sup>9</sup> The bill defines "communications services provider" as "any person, firm, corporation, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of communications services."

<sup>10</sup> The bill defines "utility service" as "electricity for light, heat, or power and natural or manufactured gas for light, heat, or power, including the transportation, delivery, transmission, and distribution of electricity or natural or manufactured gas."

<sup>11</sup> The bill defines "communications services" as "the transmission, conveyance, or routing of voice, data, audio, or video, or any other information or signals, including cable services, to a point, or between among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the client for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added."

<sup>12</sup> Sections 775.082, 775.083, 775.084, F.S.

<sup>13</sup> Section 921.0022, F.S.

<sup>14</sup> Section 921.0023(3), F.S.

**C. SECTION DIRECTORY:**

Section 1 Creates s. 812.145, F.S., relating to the theft of copper and nonferrous metals.

Section 2 Provides an effective date of October 1, 2008.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The Criminal Justice Impact Conference met on February 26, 2008 and determined this bill would have an insignificant prison bed impact.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**D. STATEMENT OF THE SPONSOR**

No statement submitted.

#### **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 5, 2008, the Committee on Homeland Security & Public Safety adopted one amendment to the bill. The amendment revises the definition of "utility" to include any person, firm, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas or electric service.

---

1                                   A bill to be entitled  
 2           An act relating to the theft of copper or other nonferrous  
 3           metals; creating s. 812.145, F.S.; providing definitions;  
 4           providing that it is a felony of the first degree to  
 5           knowingly and intentionally take copper or other  
 6           nonferrous metal from a utility or communications services  
 7           provider, thereby causing damage to the facilities of a  
 8           utility or communications services provider or  
 9           interrupting or interfering with utility or communications  
 10          services; providing criminal penalties; providing an  
 11          effective date.

12  
 13 Be It Enacted by the Legislature of the State of Florida:

14  
 15           Section 1. Section 812.145, Florida Statutes, is created  
 16 to read:

17           812.145 Theft of copper or other nonferrous metals.--  
 18           (1) As used in this section, the terms:  
 19           (a) "Communications services" means the transmission,  
 20           conveyance, or routing of voice, data, audio, video, or any  
 21           other information or signals, including cable services, to a  
 22           point, or between or among points, by or through any electronic,  
 23           radio, satellite, cable, optical, microwave, or other medium or  
 24           method now in existence or hereafter devised, regardless of the  
 25           protocol used for such transmission or conveyance. The term  
 26           includes such transmission, conveyance, or routing in which  
 27           computer processing applications are used to act on the form,  
 28           code, or protocol of the content for purposes of transmission,

29 conveyance, or routing without regard to whether such service is  
 30 referred to as voice-over-Internet-protocol services or is  
 31 classified by the Federal Communications Commission as enhanced  
 32 or value-added.

33 (b) "Communications services provider" includes any  
 34 person, firm, corporation, or political subdivision, whether  
 35 private, municipal, county, or cooperative, which is engaged in  
 36 the sale, generation, provision, or delivery of communications  
 37 services.

38 (c) "Copper or other nonferrous metals" means metals not  
 39 containing significant quantities of iron or steel, including,  
 40 without limitation, copper, copper alloy, copper utility or  
 41 communications service wire, brass, aluminum, bronze, lead,  
 42 zinc, nickel, and alloys thereof.

43 (d) "Utility" has the same meaning as in s. 812.14.

44 (e) "Utility service" means electricity for light, heat,  
 45 or power and natural or manufactured gas for light, heat, or  
 46 power, including the transportation, delivery, transmission, and  
 47 distribution of electricity or natural or manufactured gas.

48 (2) A person who knowingly and intentionally takes copper  
 49 or other nonferrous metals from a utility or communications  
 50 services provider, thereby causing damage to the facilities of a  
 51 utility or communications services provider, interrupting or  
 52 interfering with utility service or communications services, or  
 53 interfering with the ability of a utility or communications  
 54 services provider to provide service, commits a felony of the  
 55 first degree, punishable as provided in s. 775.082, s. 775.083,  
 56 or s. 775.084.

HB 799

2008

57

Section 2. This act shall take effect October 1, 2008.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. 799

COUNCIL/COMMITTEE ACTION

ADOPTED  (Y/N)  
 ADOPTED AS AMENDED  (Y/N)  
 ADOPTED W/O OBJECTION  (Y/N)  
 FAILED TO ADOPT  (Y/N)  
 WITHDRAWN  (Y/N)  
 OTHER \_\_\_\_\_

*Traveling Amendment  
No Action Required*

1 Council/Committee hearing bill: Committee on Homeland Security  
2 & Public Safety

3 Representative(s) Adams offered the following:

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

**Amendment**

Remove line 43 and insert:

(d) "Utility" includes any person, firm, corporation, association, or political subdivision, whether private, municipal, county, or cooperative, which is engaged in the sale, generation, provision, or delivery of gas or electricity service.





HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1025 Compensation for Wrongful Incarceration

SPONSOR(S): Bogdanoff

TIED BILLS: IDEN./SIM. BILLS: SB 756 (compare)

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Safety & Security Council		Birtmar	Havlicak RH
2) Policy & Budget Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill creates the "Victims of Wrongful Incarceration Compensation Act", and provides compensation and benefits to wrongfully incarcerated persons. The bill provides that a person is not eligible for compensation or benefits if the person was a convicted felon prior to the wrongful incarceration, or if the person submits their application more than 2 years after the court determines the wrongful incarceration. Eligibility is to be determined by the Chief Financial Officer using guidelines and processes provided in the bill. Payments stop upon any future felony conviction.

The bill provides compensation at the rate of \$50,000 per year of wrongful incarceration pro-rated for portions of years, not to exceed a maximum award of \$1.5 million, and indexes the rate of compensation to the annual consumer price index. Claimants are also eligible for waiver of fees and tuition for up to 120 hours of instruction at specified educational institutions, reimbursement for specified psychological counseling services, and reimbursement for specified health insurance premiums. The bill also waives fees for judicial and administrative expunction, and requires the Department of Legal Affairs and the Department of Law Enforcement to assist with the expunction of the claimant's criminal record.

As a condition of the award, the claimant must release and forever waive any governmental entity from any and all present or future claims arising from the factual situation giving rise to the relief provided under this act.

The bill prohibits attorneys and lobbyists from receiving fees in excess of 25% of the total award, or \$1,000, whichever is greater.

While the bill does not provide an appropriation, the bill has an indeterminate and potentially significant impact on state expenditures.

The bill has an effective date of July 1, 2008.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – The bill provides a mechanism to provide compensation and benefits to those who have been wrongfully incarcerated.

Promote personal responsibility – The bill provides that unpaid compensation cease upon the subsequent conviction of a felony.

#### B. EFFECT OF PROPOSED CHANGES:

For those people who are actually innocent of a crime for which they have been incarcerated, there are very few, if any, legal remedies available due to the doctrines of sovereign immunity<sup>1</sup>, absolute immunity<sup>2</sup>, and qualified immunity<sup>3</sup>. Thus, there are individuals who have been incarcerated for crimes that they did not commit with no avenue for compensation. Nationwide, 213 people have been exonerated or released from incarceration since 1989 based on post conviction DNA testing.<sup>4</sup> In recent history, nine people in Florida have been exonerated based on DNA.<sup>5</sup> In the past 10 years, seven claimants have petitioned the Legislature for compensation for wrongful incarceration: Freddie Lee Pitts and Wilbert Lee,<sup>6</sup> Jesse Hill,<sup>7</sup> Frank Lee Smith,<sup>8</sup> Wilton Dedge,<sup>9</sup> Alan Crotzer,<sup>10</sup> and Luis Diaz.<sup>11</sup>

---

<sup>1</sup> Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. Article X, section 13 of the State Constitution allows the state to waive its immunity through an enactment of general law. In 1973, the Legislature enacted s. 768.28, F.S., which allows individuals to sue the state government, subdivisions of the state, and municipalities under circumstances where a private person would be liable to the claimant. Florida courts have recognized two exceptions to the state's waiver of sovereign immunity: the state is immune from discretionary or planning-level functions (*Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988)) and is immune where the government owes a general duty to all citizens but no particular duty to the injured party (*Everton v. Willard*, 468 So.2d 936 (Fla. 1985)).

<sup>2</sup> Judges and prosecutors are afforded absolute immunity. *Berry v. State*, 400 So.2d 80 (Fla. 4<sup>th</sup> DCA 1981), review denied, 411 So.2d 380 (Fla. 1981).

<sup>3</sup> Qualified immunity protects public officials from civil damages to the extent that their conduct does not violate established statutory or constitutional rights of which a reasonable person would have known. To establish qualified immunity, the official had to be acting within the scope of his/her discretionary authority and there was a clear violation of established rights. *Gentile v. Bauder*, 718 So.2d 781 (Fla. 1998).

<sup>4</sup> Innocence Project at <http://www.innocenceproject.org/index.php> (last visited March 3, 2008).

<sup>5</sup> Those exonerated based on DNA in Florida include Jerry Frank Townsend, Frank Lee Smith, Wilton Dedge, Luis Diaz, Allen Crotzer, Orlando Boquete, Cody Davis, Larry Bostic, and Chad Heins.

<sup>6</sup> The first of 22 claims bills for Pitts and Lee was filed in 1977. HB 3035 passed in 1998, and directed the Division of Administrative Hearings to determine whether a cause for equitable relief existed, and if so, to award the claimants \$500,000 each plus attorney's fees and costs not to exceed \$250,000. The claimants were ultimately awarded the maximum allowable. The two claimants had been convicted of murder and sentenced to death for the murders of two Port St. Joe men in 1963. These convictions were ultimately overturned, partly on the grounds that there was a knowing or negligent withholding of evidence by the state, and the claimants were again convicted and sentenced to death in a new trial. In 1973, the United States Supreme Court determined that the death penalty was unconstitutional, and overturned Pitts' and Lee's death sentence at which time they began serving a sentence of life imprisonment. In 1975, after serving 12 years for murder, Governor Askew and the Cabinet granted a pardon, concluding that "substantial doubt exists as to the guilt of Pitts and Lee." Division of Administrative Hearings, Final Report in Case No 98-2005, June 30, 1998.

<sup>7</sup> Jesse Hill was arrested for violating his probation for failure to report to his probation officer. Five days after his arrest it was discovered that his original probation did not require him to report, so he was released. During his incarceration a pre-existing injury to his spine was aggravated, and he sued for false imprisonment. The jury determined that the Department of Corrections was liable, and assigned 75% of the liability to the Department and 25% to Hill; damages were assessed at \$750,000. Due to legal arguments

The federal government, the District of Columbia, and at least 22 states expressly authorize compensation for wrongful incarceration by statute.<sup>12</sup> The states that provide monetary compensation for the wrongfully convicted do so at a wide range of levels and formulas, ranging from a low of \$20,000<sup>13</sup> to a high of \$1 million.<sup>14</sup> There are states that award compensation for each day of incarceration;<sup>15</sup> New Jersey allows twice the amount of the claimant's income in the year prior to incarceration or \$20,000 per year of incarceration (whichever is greater)<sup>16</sup>; and Virginia ties the award to 90% of the Virginia per capita personal income as reported by the Economic Analysis of the U.S. Department of Commerce, for up to 20 years.<sup>17</sup>

Similarly, the states require different governmental bodies to determine compensation. Ten states and the Federal Government require compensation decisions be made by the judicial branch,<sup>18</sup> as does the new Louisiana law.<sup>19</sup> The Legislatures in several states make the appropriation;<sup>20</sup> some after having received a recommendation from a separate body.<sup>21</sup> Lastly, there are states that have an independent board make the compensation decision.<sup>22</sup>

---

regarding the assignment of comparative fault in intentional tort cases, the claim bill was filed twice: in 1989 and again in 1996. Ultimately SB 1218 (1996) passed and awarded Jesse Hill \$250,000.

<sup>8</sup> Claim bills for \$3.5 million were filed in 2001 and 2002: SB-292/HB-1483 (2001—both bills died in committee) and SB 80 (2002—withdrawn by sponsor). Frank Lee Smith spent 14 years on death row and died there, of cancer. Based on DNA evidence, he was exonerated of the 1985 rape and murder of an eight year-old girl, eleven months after his death. DNA also identified the true perpetrator, Eddie Lee Mosley, also implicated in the case of Jerry Frank Townsend (A mentally retarded man convicted of six murders and one rape; DNA exonerated him and implicated Eddie Lee Mosley. Townsend has not filed a claim bill, but is proceeding against the Broward County Sheriff's Office and the City of Miami in court.)

<sup>9</sup> Mr. Dedge served 22 years in prison for sexual battery, aggravated battery, and burglary. Based on DNA, he was exonerated. A Petition for Expungement of Record, Factual Findings and other Relief Including Actions for Declaratory Relief and Damages and Equitable Relief under Extraordinary Writ Authority was filed with the Eighteenth Judicial Circuit Court in and for Brevard County, Florida in June, 2005, case no's. 82-135-CF-A and 05-20-05-CA-007583 and subsequently transferred to the Second Judicial Circuit. The petition was dismissed by the court on August 29, 2005. He was awarded \$2 million, had tuition waived, and was offered an official apology by the Legislature during the 2005B Special Session of the Florida Legislature. See ch. 2005-354, L.O.F.

<sup>10</sup> This year, two bills have been filed for the relief of Alan Crotzer. See Senate Bill 12 and House Bill 1. Alan Crotzer spent nearly 24 years in prison for being wrongfully convicted of a July 1981 robbery and two rapes in Tampa, Florida. Judgment and sentence against Mr. Crotzer was vacated by a Hillsborough Circuit Court in January of 2006 based in part on DNA evidence. In the 2007 legislative session, HB 125 passed the full House and would have provided compensation to Mr. Crotzer. The bill died in the Senate.

<sup>11</sup> Luis Diaz was convicted of eight rapes in 1980, and was pegged as the "Bird Road Rapist." He served 25 years before being released on August 3, 2005 based on his conviction being vacated after two victims recanted their identifications and DNA evidence in two of the cases. He currently has a lawsuit pending in the United States District Court in the Southern District, Miami Division (see case # 07-20914-CIV-Lenard/Torres) alleging multiple civil rights violations as well as state tort law claims. Two claim bills have been filed for the 2008 legislative session: SB 58 and HB 409.

<sup>12</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.*; 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.

<sup>13</sup> New Hampshire (NH Stat. s. 541-B:14).

<sup>14</sup> Tennessee (Tenn. Code s. 9-8-108).

<sup>15</sup> California (\$100 per day); Iowa (\$50 per day, up to \$25,000 per year).

<sup>16</sup> NJ Stat. 52:4C-1 to 4C-6.

<sup>17</sup> Virginia Code ss. 8.01-195.11 & 19.2-327.1.

<sup>18</sup> Washington D.C., Illinois, Iowa, Maine, Massachusetts, New Jersey, New York, Ohio, Oklahoma, and West Virginia. Note that in the Federal Government and in four of these states, Illinois, New York, Ohio, and West Virginia, the decision is made by a court of claims, which is typically an administrative court.

<sup>19</sup> Louisiana Act 486 (2005).

<sup>20</sup> Montana and Virginia.

<sup>21</sup> Alabama requires verification by the Division of Risk Management, and recommendation by the committee on Compensation for Wrongful Incarceration; California requires a recommendation from the State Board of Control.

<sup>22</sup> Maryland Board of Public Works (comprised of the Governor, the Comptroller, and the Treasurer); New Hampshire Board of Claims (comprised of two appointees of the Governor; one House member; one Senate member; and a Chair appointed by the Chief

Most recently, the Legislature provided compensation to Wilton Dedge, who was wrongfully incarcerated for 22 years.<sup>23</sup> The Dedge Act provided that \$2 million be paid to the Chief Financial Officer, and authorized the Chief Financial Officer to execute a qualified assignment to an insurer which entered into a structured settlement with Mr. Dedge. The act also waived tuition and fees at state educational institutions. The act required a release and waiver of all present and future claims against the state; provided legislative intent that the award is intended to provide compensation for any and all present and future claims, that no further award would be made by the state, that the defense of sovereign immunity is not waived by the act, that the act is not a recognition of a constitutional right but rather a moral obligation; and made an apology on behalf of the state.

This bill creates a process by which a wrongfully incarcerated person who is actually innocent could apply for compensation and benefits.

## **COMPENSATION and BENEFITS**

The bill provides that a person who is determined to be wrongfully incarcerated pursuant to the act, is entitled to \$50,000 for each year of wrongful incarceration, prorated as necessary to account for portions of years, not to exceed \$1.5 million. The bill requires the annual rate to be indexed to the annual consumer price index or similar inflation indicator.

The bill further requires the Department of Financial Services to purchase an annuity on behalf of the petitioner for a term of not less than 10 years.<sup>24</sup> The terms of the annuity must provide that the annuity will not be sold, discounted, or used as security for a loan or mortgage by the applicant, must contain beneficiary provisions for the continued disbursement of the annuity in the event of the death of the applicant; and must provide that the payment reverts to the state in the event that the applicant is convicted of a felony after receipt of an award.

In addition to the annuity, an applicant would also be eligible for a waiver of tuition and fees for up to 120 hours of instruction at any Florida career center, community college, or state university as long as the person meets and maintains regular admission requirements, remains registered at such institution, and makes satisfactory academic progress as defined by the academic institution.

A wrongfully incarcerated person could also be reimbursed, pursuant to the bill, for up to a maximum of 52 hours of psychological counseling services by a licensed psychologist or psychiatrist; and for health insurance premiums for up to 5 years after cessation of incarceration if the claimant is not employed, or is employed but health insurance is not provided by his or her employer.

## **ELIGIBILITY**

The bill provides that a person is eligible for compensation if they are wrongfully incarcerated, which is defined as:

---

Justice of the Supreme Court); North Carolina Industrial Commission (administers the Worker's Comp. Act under the Department of Commerce); Tennessee Board of Claims (Commission within the Treasurer's office); and Wisconsin Claims Board (aligned with the Department of Administration and comprised of a representative of the Governor, a representative of the Secretary of Administration, a representative of the Department of Justice, and chairs of both House and Senate finance committees).

<sup>23</sup> See ch. 2005-354, LOF.

<sup>24</sup> Note that the amount is taxable unless the award is considered a qualified assignment of liability to make periodic payments as damages on account of physical injury or sickness pursuant to section 130(c) of Title 26 of the Internal Revenue Code. Section 130(c) of Title 26 of the Internal Revenue Code provides that amounts received for agreeing to a qualified assignment shall not be included in gross income. A qualified assignment is an assignment of a liability to make periodic payments as damages on account of personal injury of sickness if the assignee assumes the liability from a party to the agreement and periodic payments are fixed and determinable; such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient; the assignee's obligation is no greater than the obligation of the person who assigned the liability; and the compensation is provided on account of personal physical injuries or physical sickness.

- A person whose felony conviction and sentence have been vacated by a court of competent jurisdiction; and
- With respect to whom the court has made a finding by clear and convincing evidence that he or she:
  - Did not commit the offense that resulted in the conviction and incarceration; and
  - Did not aid, abet, or act as an accomplice or accessory to a person who committed the offense that resulted in the conviction and incarceration.

A person may petition the court for a determination of whether he or she is a wrongfully incarcerated person if such person was not subsequently convicted of the same offense or any lesser included offense for which the previous sentence and conviction were vacated, who currently has no charges pending related to the wrongful conviction, and against whom no further criminal proceedings can or will be initiated. The prosecuting authority must be given reasonable, written notice that the person intends to petition the court for such a finding. In order to be eligible for compensation, the order vacating the conviction must include a finding of wrongful incarceration and set forth details upon which that finding is based.<sup>25</sup>

Further, the bill provides that a claimant is not eligible for compensation if the claimant submits the claim to the Department of Financial Services more than two years after a court determines the person's wrongful incarceration.<sup>26</sup>

Lastly, a person would not be eligible for compensation if prior to the wrongful incarceration, the person was a convicted felon.<sup>27</sup> If the person is convicted of a felony after being awarded compensation, the bill provides that any further annuity payments will revert to the state. The bill also requires that the Attorney General and the applicant must immediately report any felony conviction to the issuer of the annuity.

## PROCEDURE

The bill requires persons desirous of compensation to apply to the Chief Financial Officer for compensation and benefits. The bill provides that the application must include a certified copy of the order finding the person to be a wrongfully incarcerated person; certified copies of the original judgment and sentence; documentation demonstrating the length of the sentence served; positive proof of identification (including current fingerprints and photo identification); all documentation maintained by the Department of Law Enforcement related to the person's criminal history or record; and any other documentation or evidence required by rules adopted by the Department of Financial Services.

The Department of Financial Services is required to process and review the completed application within 90 days of receipt. Within the first 30 days, the bill requires the Department to notify the claimant of any errors or omissions and request any additional information. The application cannot be denied for failure to correct an error or omission, or to submit additional information unless the required notice was submitted within the 30-day period. The department is required to notify the claimant of a

<sup>25</sup> Eleven other states and the federal government require innocence to be found by a court: Alabama (Al. Stat. s. 29-2-150 – 165); Washington D.C., Iowa, Massachusetts, Montana (MT Code s. 53-1-214), New York (NY Ct. of Claims Act s. 8b), Ohio, Oklahoma, Texas (Tex. Code ss. 103.001-103.052), Virginia, and West Virginia. Eleven states also allow compensation for a person who was pardoned for innocence.

<sup>26</sup> A majority of the other states with wrongful conviction compensation statutes include a 2-year time limit for filing the claim.

<sup>27</sup> Note that this provision is commonly referred to as "the clean hands" requirement.

determination that the claim meets the requirement of the act within 5 days of making such determination.

The bill requires the Chief Financial Officer to draw and issue a state warrant for the entire amount of the claim within 30 days of the notice that the claim meets the requirements of the act.

### **SOURCE OF FUNDS**

The bill requires the Chief Financial Officer to issue the state warrant from the General Revenue Fund or any other available funds.

The bill also requires that the amount awarded is subject to specific appropriation made by a separate budget request in addition to the legislative budget request of the Department of Financial Services.

Note that the bill does NOT contain an appropriation.

### **EXPUNGEMENT OF RECORDS**

The courts maintain sole discretion to determine whether, and how, to seal or expunge court records without interference from legislative requirements.<sup>28</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.<sup>29</sup> Section 943.0585, F.S., requires that the person must apply for and receive a certificate of eligibility for expunction from the Florida Department of Legal Affairs. The Department is required to issue a certificate if:

- the person has submitted a certified statement from the state attorney that an indictment, information, or other charging document was not filed in the case;
- an indictment, information, or charging document was filed, it was dismissed or nolle prosequi, and that none of the charges resulted in a trial;
- the criminal history record does not relate to a violation of specified statutes, where the defendant was found guilty of, or pled guilty or nolo contendere without regard to whether adjudication was withheld;<sup>30</sup>
- the person has never been adjudicated guilty of a criminal offense or been adjudicated delinquent for committing specified statutory crimes as a minor;

<sup>28</sup> State v. D.H.W., 686 So.2d 1331, 1334 (Fla. 1996).

<sup>29</sup> Section 943.0585, F.S.

<sup>30</sup> Section 943.0585, F.S., prohibits the expungement of records relating to the following violations: s. 393.135, F.S., relating to sexual misconduct with the developmentally disabled; s. 394.4593, F.S., relating to sexual misconduct in the mental health setting; s. 787.025, F.S., relating to luring or enticing a child; chapter 794, F.S., relating to sexual battery; s. 796.03, F.S., relating to procuring a person under the age of 18 for prostitution; s. 800.04, F.S., lewd or lascivious acts on or in the presence of a person less than 16; s. 810.14, F.S., relating to voyeurism; s. 817.034, F.S., relating to communications fraud; s. 825.1025, F.S., relating to lewd or lascivious activity on or in the presence of an elderly person; s. 827.071, F.S., relating to sexual performance by a child; chapter 839, F.S., relating to offenses by public officers and employees; s. 847.0133, F.S., relating to transmitting obscene materials to minors; s. 847.0135, F.S., relating to computer pornography; s. 847.0145, F.S., relating to selling or buying of minors; s. 893.135, F.S., relating to trafficking; s. 916.1075, F.S., relating to sexual misconduct with the mentally deficient; s. 907.041, F.S., a statutory list of dangerous crimes that preclude a person from being given pretrial release with nonmonetary conditions; any violation specified as a predicate offense for registration as a sexual predator pursuant to s. 775.21, F.S.

- the person has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains;
- the person has never secured a prior sealing or expunction of a criminal history record;
- the person is no longer under court supervision applicable to the criminal activity to which the expunction pertains.

A person petitioning for an expunction must remit a \$75 processing fee to the Department of Law Enforcement for placement in the Department of Law Enforcement Operating Trust Fund, unless such fee is waived by the executive director.<sup>31</sup>

Any criminal history record which is ordered expunged by a court of competent jurisdiction is required to be physically destroyed or obliterated by any criminal justice agency having custody of such record, except that the criminal history record in the custody of the Department of Law Enforcement must be retained.<sup>32</sup> A criminal justice agency may retain a notation indicating compliance with an order to expunge.<sup>33</sup> The law allows a person who is the subject of an expunged criminal history record to lawfully deny or fail to acknowledge arrests covered by the expunged record, with specified exceptions,<sup>34</sup> and may not be held for perjury for failure to recite or acknowledge an expunged criminal record. In regard to the official records of the court, the court clerk is required to remove from the official records of the court, excepting the court file, all entries and records subject to the order and seal the records together with the court file and retain same in a non-public index, subject to further order of the court.<sup>35</sup>

Non-judicial arrest records can be expunged administratively by the Department of Law Enforcement when the arrest was made contrary to law or by mistake.<sup>36</sup> Administrative expunction requires an application, a supporting endorsement signed by the head of the arresting agency and on agency letterhead, and an affidavit executed by the chief of the arresting law enforcement agency, sheriff, or department head verifying that he or she has reviewed the record of the arrest and that the arrest was contrary to law or was a mistake.<sup>37</sup>

This bill requires the Department of Legal Affairs and the Department of Law Enforcement to take all action necessary to judicially and administratively expunge the claimant's criminal record arising from a wrongful arrest, wrongful conviction, and wrongful incarceration, notwithstanding any provision of s. 943.0585, F.S. The bill also provides that fees for the expunction process shall be waived.

<sup>31</sup> Section 943.0585(2)(b), F.S.

<sup>32</sup> Section 943.0585(4)(a), F.S., which provides that expunged criminal history records retained by the Department of Law Enforcement are confidential and exempt from the public records provisions, and not available to any person or entity except upon order of a court of competent jurisdiction.

<sup>33</sup> Section 943.0585(4)(a), F.S.

<sup>34</sup> Section 943.0585(4)(a), F.S., does not allow a person who is the subject of an expunged criminal history record to deny or fail to acknowledge arrests if the subject is a candidate for employment with a criminal justice agency; is a defendant in a criminal prosecution; concurrently or subsequently petitions for sealing of records; is a candidate for admission to The Florida Bar; is seeking to be employed or licensed by or to contract with the Department of Children and Family Services or the Department of Juvenile Justice in a position having direct contact with children, the developmentally disabled, the aged, or the elderly; is seeking to be employed or licensed by the Department of Education, any district school board, university laboratory school, charter school, private or parochial school, or any governmental entity that licenses child care facilities; or is seeking employment with a Florida seaport.

<sup>35</sup> Rule 3.692, Fla. R. Crim. P.

<sup>36</sup> Section 943.0581, F.S.

<sup>37</sup> Rule 11C-7.008, F.A.C.

## MISCELLANEOUS PROVISIONS

The bill limits attorneys, advocates, lobbyists, or any other entity acting in a similar capacity from receiving compensation in excess of 25% of the total award under this act, or \$1,000, whichever is greater, for providing assistance to, representing, or acting on behalf of a wrongfully accused person. The bill does not provide a limit on attorneys and lobbyists receiving costs.

The bill also provides that if an applicant rejects the offer to settle his or her claim, the applicant may file suit against the state pursuant to s. 768.28, F.S.<sup>38</sup>

The bill requires a claimant to sign a release and waiver prior to receiving a state warrant, on behalf of the claimant, heirs, successors, and assigns, forever releasing the state or any agency, instrumentality, or political subdivision thereof, from all present or future claims that such persons may have against such entities arising out of the factual situation in connection with the conviction for which compensation is sought.

### C. SECTION DIRECTORY:

---

Section 1: Provides that the act be titled, "Victims of Wrongful Incarceration Compensation Act."

Section 2. Provides definitions and eligibility criteria.

Section 3. Provides for compensation and benefits.

Section 4. Provides for the application process.

Section 5. Provides the Department of Financial Services with rule-making authority.

Section 6. Provides limitations on attorney's and lobbyist's fees.

Section 7. Allows the claimant to file suit against the state if the claimant rejects an offer to settle.

Section 8. Provides an effective date of July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not have any impact on state revenues.

#### 2. Expenditures:

Indeterminate. See fiscal comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local revenues.

---

<sup>38</sup> Section 768.28, F.S., provides that the state waives its immunity in tort, but amounts over the statutory caps of \$100,000 per person and \$200,000 per incident may not be collected without further act of the Legislature.



2. Expenditures:

The bill does not appear to have any impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill provides that a person who is determined to be wrongfully incarcerated pursuant to the act is entitled to compensation and benefits in four specific areas: monetary compensation, a waiver of tuition/fees at specified career or academic institutions, reimbursement for psychological counseling services, and reimbursement of health insurance premiums.

It is expected that there will be very few people who are eligible pursuant to the act. There are seven men who have been recently exonerated who have not been compensated, though it appears that none would meet the requirements provided in the act.<sup>39</sup>

Of the states that do provide compensation to the wrongfully convicted, experience dictates that the number of people actually compensated is relatively small. West Virginia has paid only two claims between 1987 and 1999.<sup>40</sup> Information provided by the State of New York (which has no sovereign immunity, and is considered to have a liberal compensation statute), shows that between 1985 and February of 2005, there have been 12 successful claims for unjust conviction and imprisonment, which claimants have been awarded a total of \$5,484,218.43. An additional twenty claims have been settled in New York, totaling \$10,689,250. The largest individual claim was a settlement of \$3.3 million for a man that was wrongfully convicted of murder and spent 14 years in prison.<sup>41</sup>

Regarding monetary compensation, counseling services and health insurance premiums, the fiscal impact on state expenditures is indeterminate, but potentially significant. Compensation will vary based on years of wrongful incarceration, but could exceed \$1.5 million per individual. It is unknown what the costs associated with counseling and insurance premiums might be. Furthermore, the Department of Financial Services (DFS) has noted there is no money to pay these reimbursements if the "total amount awarded" or "the entire amount of the claim" has already been paid out of a sum certain – via lump sum warrant or annuity.

The Department of Education provided the following information regarding the average cost per credit hour, regarding the waiver of tuition and fees:

YEAR	State Universities	Community Colleges	Technical Centers
------	--------------------	--------------------	-------------------

<sup>39</sup> Luis Diaz was incarcerated 25 years, and has a suit pending in federal court; Allen Crotzer was incarcerated 24 years, and had a juvenile conviction prior to his wrongful conviction; Jerry Frank Townsend was incarcerated 22 years and has a suit pending; Orlando Boquete escaped while wrongfully incarcerated and is not seeking compensation; Chad Heins has an indictment pending against him; Larry Bostick has multiple prior convictions.

<sup>40</sup> "Tough Luck for the Innocent Man," Michael Higgins, 85 A.B.A.J. 46, 49 (Mar. 1999).

<sup>41</sup> Anthony Faison was convicted of murder in 1987 based on eyewitness testimony that was ultimately retracted.

<http://www.justicedenied.org/freetat.htm>. (Last visited 4/11/07.)

2002-03	\$89.70	\$52.36	\$1.59
2003-04	\$95.83	\$56.14	\$1.63
2004-05	\$102.12	\$59.11	\$1.72
2005-06	\$107.49	\$63.67	\$1.83
2006-07	\$110.83	\$67.26	\$1.87

---

The cost per credit hour above includes tuition and fees that are charged to all students such as the fee for health, activity, & services; athletic fee; access/transportation fee; building fee; capital improvement fee; financial aid fee; and technology fee.

The Department of Law Enforcement has stated that the provisions of this bill would not have a fiscal impact on their operations; the Department of Legal Affairs has not provided a fiscal impact. The DFS, however, has reported that to implement their responsibilities under this bill, it will require 3 FTE and approximately \$200,000 of recurring General Revenue.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

##### 2. Other:

**Sovereign Immunity:** Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 which allows the state to waive its immunity through an enactment of general law. Sovereign immunity extends to all subdivisions of the state, including counties, municipalities, and school boards. In 1973, the Florida Legislature enacted s. 768.28, F.S. This section allows individuals to sue state government, subdivisions of the state, and municipalities. According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of the state..."

Sovereign immunity does not protect the state for the following actions:

- i. Taking of property;<sup>42</sup>
- ii. Civil rights actions;<sup>43</sup>
- iii. Breach of contract;<sup>44</sup>
- iv. Counterclaims against the state.<sup>45</sup>

The doctrine of sovereign immunity clearly provides protection for the government against tort liability. As a matter of equity, the Legislature has the authority to compensate individuals who have been injured by governmental negligence, without waiving sovereign immunity, through the claim bill process.<sup>46</sup> Should a court find that wrongful incarceration is akin to a taking of one's liberty, and thus a constitutional violation, sovereign immunity would not protect the state.

The bill also allows an applicant who rejects an offer to settle his or her claim for compensation pursuant to this chapter to file suit against the state in the circuit court in which the applicant was convicted pursuant to s. 768.28, F.S. Query whether this would expand the state's tort liability by waiving existing sovereign immunity for claims of wrongful incarceration.

### **Separation of Powers and Unlawful Delegation**

Article II, Section 3 of the Florida Constitution provides that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The separation of powers doctrine prevents the Legislature from delegating its constitutional duties. In reviewing the constitutionality of legislative policy making, the Florida Supreme Court has acknowledged that "where the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the doctrine."<sup>47</sup> In short, the Legislature must give an agency adequate guidelines to carry out the law to ensure that the agency does not become the "lawgiver rather than the administrator."<sup>48</sup>

This bill creates two duties: determining eligibility for compensation and appropriating funds. While the determination of eligibility for compensation is typically made by the Legislature when considering claim bills based on negligence, this bill delegates the determination of eligibility to the Department of Financial Services, and provides guidelines and procedures for making the eligibility decision. Several of the provisions of the bill give unclear or contradictory guidance to the Department of Financial Services, and thus may raise unconstitutional delegation issues (see Drafting Comments below). The bill maintains the Legislature's unique and sole authority to make appropriations.

#### **B. RULE-MAKING AUTHORITY:**

The bill gives the Department of Financial Services, on behalf of the Chief Financial Officer, authority to adopt rules regarding the forms and procedures related to applications for compensation under this act. The Department notes that the rulemaking authority should be mandatory, rather than optional, and expressed concern that the substance of the bill allows the Department to require documentation,

<sup>42</sup> *State Road Department v. Tharp*, 1 So.2d 868 (Fla. 1941).

<sup>43</sup> *Howlett by and Through Howlett v. Rose*, 496 U.S. 356 (1990) and s. 760.07, F.S.

<sup>44</sup> *Pan-Am Tobacco Corp. v. State Department of Corrections*, 471 So.2d 4 (Fla. 1984), rehearing denied (July 1, 1985).

<sup>45</sup> Section 768.14, F.S.

<sup>46</sup> See s. 768.28(5), F.S., Rule 5.6 of the Rules of the Florida House of Representatives (2006-2008), and Rule 4.81 of the Rules of the Florida Senate (2006-2008).

<sup>47</sup> *Askew v. Cross Key Waterways*, 372 So.2d 913, 921 (Fla. 1978).

<sup>48</sup> *Id.* at 925.

evidence, or information as required by rule but the language authorizing the Department to adopt rules does not contemplate rules regarding documentation, evidence, or information.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. FDLE recommends that the term 'incarceration' not include time spent in a county jail awaiting trial. (Lines 39-49).
2. It is unclear whether the bill is meant to include juveniles adjudicated delinquent in its eligibility requirements. (Lines 39-49).
3. Regarding eligibility, the bill requires a finding that no further criminal proceedings can or will be brought against the claimant. That requirement should likely be qualified to provide that no further proceedings shall be brought 'with respect to the charges for which the previous sentence and conviction were vacated.' (Lines 61-63).
4. Regarding eligibility, the bill requires that there can be no charges pending relating to the charges for which the previous sentence and conviction were vacated. What if other charges are pending? Consider removing the qualification here. (Lines 59-61).
5. It appears that indexing the maximum total compensation to the consumer price index would allow the amount paid to exceed the cap of \$1.5 million. It is unclear how the Chief Financial Officer would/ could purchase an annuity based on an amount that would change over time. (Lines 76-79).
6. Allowing the rate of compensation to be indexed to the annual consumer price index or similar inflation indicator may not give the Chief Financial Officer adequate guidance on which indicator to use. Consider instead the following: shall be adjusted annually by the percentage change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1982-84+100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics. (Line 78).
7. It is not clear who should make the separate budget request required. (Line 81).
8. It appears that the annuity payments would be taxable income to the claimant, unless tied to a structured settlement agreement and paid for physical injury, as it was done in the act that compensated Wilton Dedge.<sup>49</sup> (Lines 84-86).
9. The bill requires the Attorney General to notify the issuer of the annuity if the applicant is convicted of a felony after he or she has received an award. The Attorney General does not have access to such information. Consider whether the Chief Financial Officer should instead be required to do a background check of the applicant every year prior to the annuity payment being issued, and notify the issuer if the payment needs to revert to the state. (Lines 93-103).
10. Should the payments stop for conviction of a felony in another state? This would require the CFO to request a national background check. (Lines 93-103).
11. What if the later conviction had adjudication withheld, or was later reversed on a technicality? (Lines 93-103).
12. The bill requires reimbursement for psychological counseling and health insurance premiums by the Chief Financial Officer, who has no mechanism or process for paying such claims. Query whether counseling and health insurance premiums could be covered by the claimant by an initial lump-sum payment, or be paid from their annuity payments? (Lines 114-120).

<sup>49</sup> See ch. 2005-354, LOF.

13. It is unclear whether the health insurance premium reimbursement is available to a claimant who is employed but cannot afford the health insurance provided by his or her employer. (Lines 117-120).
14. The bill provides for ineligibility if 'prior to his or her wrongful conviction and incarceration, the person was a convicted felon.' Query whether this would (or should) include felony convictions during incarceration. (Lines 127-128).
15. FDLE recommends that the provision requiring 'the claimant to provide to DFS all documentation maintained by FDLE related to the person's criminal history or criminal record' be stricken and replaced with language requiring the person to submit two full sets of fingerprints administered by a law enforcement agency, one of which shall be forwarded by the CFO to FDLE for statewide background checks and to the FBI for national criminal records checks. Cost to be absorbed by FDLE; results submitted to DFS. (Lines 147-149).
16. The bill requires the Chief Financial Officer to issue a state warrant within 30 days of a determination that the claimant meets the requirements of the act, and also requires that the amount be awarded subject to specific appropriation made by separate budget request. It is unclear whether such request could be made and approved within 30 days. (Lines 80-83 and 170 - 174).
17. DFS notes that the bill does not direct DFS what to do in the event that the application does not meet the requirements of the act. Query whether the application process would be subject to the Administrative Procedures Act, and thus subject to a hearing if the application is denied. (Lines 164-169).
18. The bill requires the Chief Financial Officer to purchase an annuity, and also requires that she draw and issue a state warrant, which is to be received by the claimant. These two provisions appear to be incongruous. (Lines 84-87 and 170-175).
19. The bill requires the claimant to sign a release and waiver prior to receiving a state warrant. Query whether the release should be signed prior to execution of annuity documents, as the claimant won't be receiving a state warrant. (Lines 175-184).
20. The bill requires the Department of Legal Affairs and the Department of Law Enforcement to take all action necessary to judicially and administratively expunge the claimant's criminal record. It would appear that requiring either department to petition the court on behalf of the claimant may pose a conflict, and could be better accomplished by the claimant and his or her attorneys. (Lines 185 - 193).
21. Consider qualifying the records to be expunged to non-judicial records as the Legislature cannot require the court to expunge its own records. (Lines 185-193).
22. If a person's records are expunged, the only way to prove that the conviction was reversed would be by court order pursuant to s. 943.0585, F.S. Consider removing this section, and replacing it with a provision that waives the fees should a person want to have their record expunged. (Lines 185-193).
23. The bill limits attorney's and lobbyist's fees to 25% of the total award (or \$1000, whichever is greater). It is unclear if, how, and when to value the benefits awarded in addition to the monetary compensation (i.e., waiver of tuition, reimbursement of psychologist, reimbursement for health insurance premiums). (Line 201).

24. DFS notes that the limitation on attorney's fees is tied to representation of a "wrongfully accused person", which term is not defined in the bill. Presumably a wrongfully accused person would not be entitled to compensation. Consider changing this term to "wrongfully incarcerated." (Lines 203-204).
25. The bill allows the claimant to file suit if he or she rejects the offer to settle. Nothing in the bill provides for an offer to settle. (Lines 205-210).
26. The bill does not include a statement that payment should not be considered a waiver of sovereign immunity or an increase in the limits of the state's liability.
27. The bill does not include a statement that payment is intended to provide sole compensation for any and all present and future claims arising out of the factual situation in connection with the wrongful incarceration.

It is expected that the sponsor will be filing a strike-all amendment that addresses the issues enumerated above.

---

#### E. STATEMENT OF THE SPONSOR

No statement submitted.

#### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

1 A bill to be entitled  
 2 An act relating to compensation for wrongful  
 3 incarceration; creating the "Victims of Wrongful  
 4 Incarceration Compensation Act"; defining "wrongfully  
 5 incarcerated person"; providing for determination by the  
 6 courts of wrongful incarceration of certain defendants  
 7 upon petition; providing conditions which constitute  
 8 eligibility and ineligibility for compensation under the  
 9 act; specifying forms of compensation and benefits to  
 10 which a wrongfully incarcerated person is entitled;  
 11 providing requirements with respect to such compensation  
 12 and benefits; providing procedures and requirements with  
 13 respect to application by a claimant for compensation and  
 14 benefits; providing procedures and requirements of the  
 15 Chief Financial Officer and the Department of Financial  
 16 Services with respect to the processing of a claimant's  
 17 application; providing specified notice requirements;  
 18 providing for the issuance of a warrant by the Chief  
 19 Financial Officer; requiring a claimant to sign a release  
 20 and waiver as a precondition to receiving a warrant;  
 21 requiring the Department of Legal Affairs and the  
 22 Department of Law Enforcement to judicially and  
 23 administratively expunge an eligible claimant's criminal  
 24 record arising from his or her wrongful arrest,  
 25 conviction, and incarceration; providing for waiver of  
 26 fees for expunction; authorizing the Department of  
 27 Financial Services to adopt rules; providing a limitation  
 28 on attorney's fees and lobbyist's fees; providing that an

29 applicant who rejects an offer to settle his or her claim  
 30 for compensation under the act may file suit against the  
 31 state for compensation; providing an effective date.

32  
 33 Be It Enacted by the Legislature of the State of Florida:

34  
 35 Section 1. Short title.--This act may be cited as the  
 36 "Victims of Wrongful Incarceration Compensation Act."

37 Section 2. Definition; finding of wrongful  
 38 incarceration.--

39 (1) As used in this act, the term "wrongfully incarcerated  
 40 person" means a person:

41 (a) Whose felony conviction and sentence have been vacated  
 42 by a court of competent jurisdiction; and

43 (b) With respect to whom the court has made a finding by  
 44 clear and convincing evidence that he or she:

45 1. Did not commit the offense that resulted in his or her  
 46 conviction and incarceration; and

47 2. Did not aid, abet, or act as an accomplice or accessory  
 48 to a person who committed the offense that resulted in his or  
 49 her conviction and incarceration.

50 (2) Whenever a court enters an order vacating a conviction  
 51 and sentence, upon petition by the defendant or the defendant's  
 52 attorney, the court must determine whether the defendant was  
 53 wrongfully incarcerated and set forth in detail the evidence on  
 54 which that finding is based.

55 (3) A person whose sentence and conviction have been  
 56 vacated as provided in subsection (1), who has not been



57 subsequently convicted of the same offense or any lesser  
 58 included offense for which the previous sentence and conviction  
 59 were vacated, who currently has no charges pending against him  
 60 or her related to the charges for which the previous sentence  
 61 and conviction were vacated, and against whom no further  
 62 criminal proceedings can or will be initiated by any  
 63 prosecutorial authority may petition the court for a  
 64 determination of whether he or she is a wrongfully incarcerated  
 65 person if the prosecuting authority is given reasonable notice  
 66 in writing that the person intends to petition the court for  
 67 such a finding.

68 Section 3. Compensation for wrongful incarceration.--

69 (1) Except as otherwise provided in this section and  
 70 subject to the limitations and procedures prescribed in section  
 71 4, a person who is found to be a wrongfully incarcerated person  
 72 is entitled to:

73 (a) Monetary compensation for wrongful incarceration,  
 74 which shall be calculated at a rate of \$50,000 for each year of  
 75 wrongful incarceration and prorated as necessary to account for  
 76 portions of years, up to a maximum of \$1,500,000. The annual  
 77 rate of compensation and maximum total compensation shall be  
 78 indexed to the annual consumer price index or similar inflation  
 79 indicators.

80 1. The total amount awarded is subject to specific  
 81 appropriation made by a separate budget request in addition to  
 82 the legislative budget request of the Department of Financial  
 83 Services.

84           2. The total amount awarded shall be used by the  
 85 Department of Financial Services to purchase an annuity on  
 86 behalf of the petitioner for a term of not less than 10 years.

87 The terms of the annuity shall:

88           a. Provide that the annuity may not be sold, discounted,  
 89 or used as security for a loan or mortgage by the applicant.

90           b. Contain beneficiary provisions for the continued  
 91 disbursement of the annuity in the event of the death of the  
 92 applicant.

93           c. Provide that payment of the annuity reverts to the  
 94 state in the event that the applicant is convicted of a felony  
 95 after he or she has received an award of compensation under this  
 96 act.

97  
 98 When an applicant who has received an award of compensation  
 99 under this act is convicted of a felony after he or she has  
 100 received the award of compensation as described in sub-  
 101 subparagraph c., the Attorney General and the applicant must  
 102 immediately report the felony conviction to the issuer of the  
 103 annuity.

104           (b) A waiver of tuition and fees for up to 120 hours of  
 105 instruction at any career center established under s. 1001.44,  
 106 Florida Statutes, any community college established under part  
 107 III of chapter 1004, Florida Statutes, or any state university,  
 108 if the person found to have been wrongfully incarcerated:

109           1. Meets and maintains the regular admission requirements  
 110 of such career center, community college, or state university;

111           2. Remains registered at such educational institution; and

112 3. Makes satisfactory academic progress as defined by the  
 113 educational institution in which the claimant is enrolled.

114 (c) Reimbursement for up to a maximum of 52 hours of  
 115 psychological counseling services by a licensed psychologist or  
 116 psychiatrist.

117 (d) Reimbursement for health insurance premiums for up to  
 118 5 years after cessation of incarceration if the claimant is not  
 119 employed or if the claimant is employed but health insurance is  
 120 not provided by his or her employer.

121 (2) A wrongfully incarcerated person is not eligible for  
 122 compensation or benefits under this act if:

123 (a) The person submits his or her application to the  
 124 Department of Financial Services more than 2 years after a court  
 125 of competent jurisdiction determines the person's wrongful  
 126 incarceration; or

127 (b) Prior to his or her wrongful conviction and  
 128 incarceration, the person was a convicted felon.

129 Section 4. Application for compensation and benefits for  
 130 wrongful incarceration.--

131 (1) A wrongfully incarcerated person seeking compensation  
 132 and benefits as described in section 3 must apply to the Chief  
 133 Financial Officer for such compensation and benefits. The  
 134 application must include:

135 (a) A certified copy of the order finding the claimant to  
 136 be a wrongfully incarcerated person;

137 (b) Certified copies of the original judgment and  
 138 sentence;

139           (c) Documentation demonstrating the length of the sentence  
 140 served, including documentation obtained from the Department of  
 141 Corrections regarding the person's admission into and release  
 142 from the department's custody;

143           (d) Positive proof of identification, including  
 144 fingerprints and a current form of photo identification,  
 145 demonstrating that the person seeking compensation is the same  
 146 individual who was wrongfully incarcerated;

147           (e) All documentation maintained by the Department of Law  
 148 Enforcement related to the person's criminal history or criminal  
 149 record; and

150           (f) Any other documentation, evidence, or information  
 151 required by rules adopted by the Department of Financial  
 152 Services on behalf of the Chief Financial Officer pursuant to  
 153 section 5.

154           (2) Upon receipt of an application for compensation, the  
 155 Chief Financial Officer shall examine the application and notify  
 156 the claimant within 30 calendar days of receipt thereof of any  
 157 errors or omissions and request any additional information  
 158 relevant to the review of the application. The Chief Financial  
 159 Officer may not deny an application for failure of the claimant  
 160 to correct an error or omission or supply additional information  
 161 unless the Chief Financial Officer timely notifies the claimant  
 162 of such errors or omissions or requests such additional  
 163 information within the 30-day period specified in this  
 164 subsection. The Department of Financial Services shall process  
 165 and review each completed application within 90 calendar days of  
 166 receipt of the application. If the department determines that

167 | the claim for compensation meets the requirements of this act,  
 168 | the department shall notify the claimant within 5 business days  
 169 | of that determination.

170 | (3) Within 30 calendar days after the issuance of notice  
 171 | to the claimant under subsection (2), the Chief Financial  
 172 | Officer shall draw and issue a state warrant for the entire  
 173 | amount of the claim from the General Revenue Fund or any other  
 174 | available state funds.

175 | (4) Before receiving a state warrant under subsection (3),  
 176 | the claimant must sign a release and waiver on behalf of the  
 177 | claimant, and his or her heirs, successors, and assigns, forever  
 178 | releasing the state or any agency, instrumentality, or political  
 179 | subdivision thereof, or any other entity subject to the  
 180 | provisions of s. 768.28, Florida Statutes, from all present or  
 181 | future claims that the claimant or his or her heirs, successors,  
 182 | or assigns may have against such entities arising out of the  
 183 | factual situation in connection with the conviction for which  
 184 | compensation is sought under this act.

185 | (5) Notwithstanding any provision of s. 943.0585, Florida  
 186 | Statutes, the Department of Legal Affairs and the Department of  
 187 | Law Enforcement shall, upon notification by the Department of  
 188 | Financial Services that a claimant is eligible for compensation,  
 189 | immediately take all action necessary to judicially and  
 190 | administratively expunge the claimant's criminal record arising  
 191 | from his or her wrongful arrest, wrongful conviction, and  
 192 | wrongful incarceration. All fees for this process shall be  
 193 | waived.

194           Section 5. Rules.--The Department of Financial Services,  
 195 on behalf of the Chief Financial Officer, may adopt rules  
 196 regarding the forms and procedures related to applications for  
 197 compensation under this act.

198           Section 6. Limitations on attorney's fees and lobbyist's  
 199 fees.--An attorney, advocate, lobbyist, or any other entity  
 200 acting in a similar capacity is prohibited from receiving  
 201 compensation in excess of 25 percent of the total award under  
 202 this act, or \$1,000, whichever is greater, for providing  
 203 assistance to, representing, or acting on behalf of a wrongfully  
 204 accused person.

205           Section 7. Rejection of offer to settle; suit against  
 206 state.--If the applicant rejects the offer to settle his or her  
 207 claim for compensation pursuant to this chapter, the applicant  
 208 may file suit against the state for compensation in the circuit  
 209 court in which the applicant was convicted pursuant to s.  
 210 768.28, Florida Statutes.

211           Section 8. This act shall take effect July 1, 2008.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

Bill No. 1025

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1 Council/Committee hearing bill: Safety & Security Council  
2 Representative(s) offered the following:

3 Amendment (with title amendment)

4 Remove everything after the enacting clause and insert:

5 Section 1. Short title.--This act may be cited as the  
6 "Victims of Wrongful Incarceration Compensation Act."

7 Section 2. Eligibility for compensation for wrongful  
8 incarceration.--

9 (1) A person who has been wrongfully convicted of a felony  
10 offense and incarcerated in a prison within the Florida  
11 Department of Corrections as a result of that conviction is  
12 eligible for compensation if:

13 (a) the conviction and sentence has been vacated,  
14 dismissed, or reversed by a court of competent jurisdiction;

15 (b) no further proceedings can or will be held against the  
16 claimant on any facts and circumstances alleged in the  
17 proceedings which resulted in the conviction;

18 (c) the claimant petitions the court for a finding of  
19 eligibility and amount of compensation no more than 2 years  
20 after the order vacating, reversing, or dismissing the sentence;

21 (d) the claimant has no other suits pending in state or  
22 federal court requesting compensation arising out of the factual

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

23 situation in connection with the conviction for which  
24 compensation is being sought under this act;

25 (e) the claimant has not been found guilty of any felony  
26 offenses other than the conviction which was dismissed, reversed  
27 or vacated that is the basis for the claim for wrongful  
28 incarceration and no felony offenses are currently pending;

29 (f) a claims bill has not been filed relating to the  
30 claimant's conviction and incarceration that is the basis for  
31 compensation under this act; and

32 (g) the court has made a finding by clear and convincing  
33 evidence that the claimant is actually innocent.

34 (2) As used in this section, the term "actually innocent"  
35 means:

36 (a) The claimant's acts did not constitute a crime;

37 (b) The claimant did not commit the offense that resulted  
38 in his or her conviction and incarceration; and

39 (c) The claimant did not aid, abet, or act as an  
40 accomplice or accessory to a person who committed the offense  
41 that resulted in his or her conviction and incarceration.

42 Section 3. Judicial finding of eligibility and amount of  
43 compensation; findings as to attorney's fees.--

44 (1) The claimant may petition the same court that issued  
45 the order vacating, reversing, or dismissing the claimant's  
46 conviction and sentence to determine whether the claimant is  
47 eligible for compensation pursuant to this act. Such petition  
48 may be filed contemporaneously with the motion to vacate,  
49 reverse, or dismiss, but may not be filed more than 6 months  
50 after the order vacating, reversing, or dismissing the  
51 conviction and sentence has been issued. Upon a finding that the  
52 claimant is eligible for compensation pursuant to this act, the



Amendment No. (for drafter's use only)

53 court shall also make a finding regarding the amount of  
54 compensation using the factors set forth in this act.

55 (2) In making a finding regarding the amount of  
56 compensation for an eligible claimant, the court shall consider  
57 the following factors:

58 (a) the claimant's earning capacity;

59 (b) the claimant's need for drug and/or alcohol  
60 counseling;

61 (c) the claimant's need for mental health counseling;

62 (d) the claimant's need for health insurance; and

63 (e) the claimant's need for housing.

64 (3) For determinations made in 2008, compensation may not  
65 exceed a rate of \$50,000 per year of incarceration after  
66 conviction prorated as necessary to account for portions of  
67 years, up to a maximum of \$1,500,000. For determinations made  
68 after 2008, the court may adjust the annual rate and maximum  
69 amount for inflation using the Consumer Price Index starting in  
70 2008.

71 (4) The court shall determine whether the compensation  
72 shall be payable to the claimant in one single disbursement,  
73 through the purchase of an annuity, or any other combination and  
74 shall make specific findings regarding disbursement of funds.

75 (5) The court shall make a separate finding regarding the  
76 amount of attorney's fees and reasonable costs. The court may  
77 not award attorney's fees that exceed a total of 25% of the  
78 court's finding regarding the amount of compensation to the  
79 claimant, or \$1,000, whichever is greater. The finding shall  
80 state with specificity the fees for each of the named  
81 attorney(s), as limited by this act. The court shall make a  
82 separate finding as to the amount of their costs.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

83 (6) The court shall not make any findings pursuant to this  
84 section regarding fault, liability or damages.

85 (7) Findings by the court regarding eligibility, the  
86 amount of compensation, and the amount of attorney's fees are  
87 not appealable. If the claimant chooses not to accept the  
88 court's findings the claimant's sole recourse is the filing of a  
89 legislative claims bill in accordance with the current Rules of  
90 the House of Representatives and the Rules of the Senate.

91 Section 4. Duties of the Department of Financial  
92 Services and the Chief Financial Officer.--

93 (1) No later than 10 days from receiving the court's  
94 findings regarding the amount of compensation, the Chief  
95 Financial Officer shall request release of funds pursuant to  
96 chapter 216, Florida Statutes.

97 (2) Upon release of the requested funds by the Legislative  
98 Budget Commission, the Department of Financial Services shall  
99 pay the amount of compensation as determined by the court  
100 pursuant to section 3 of this Act. The Department of Financial  
101 Services is directed to execute all necessary agreements to  
102 implement this Act.

103 (3) Subject to specific appropriation made to the  
104 Department of Financial Services, the Chief Financial Officer  
105 shall purchase the annuity or make such other payment as  
106 required by this act upon delivery by the claimant to the Chief  
107 Financial Officer of an executed release and waiver on behalf of  
108 the claimant and his or her parents, heirs, successors, and  
109 assigns forever releasing the State of Florida and any agency,  
110 instrumentality, officer, employee, or political subdivision  
111 thereof or any other entity subject to the provisions of s.  
112 768.28, Florida Statutes, from any and all present or future  
113 claims, or declaratory relief the claimant or any of his or her

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

114 parents, heirs, successors, or assigns may have against such  
115 enumerated entities and arising out of the factual situation in  
116 connection with the conviction for which compensation is  
117 awarded. However, declaratory action to obtain judicial  
118 expungement of the claimant's judicial and executive branch  
119 records as otherwise provided by law is not prohibited by this  
120 act.

121 (5) No later than 90 days after receiving a certified  
122 finding from the court that a claimant is eligible for  
123 compensation including a finding regarding the amount of  
124 compensation and a finding regarding attorney's fees and costs,  
125 the Department of Financial Services shall issue separate  
126 warrant(s) to the named attorney(s) for the amounts set out in  
127 the court's findings regarding attorney's fees and costs.

128 (6) There is hereby appropriated recurring General Revenue  
129 to the Department of Financial Services in sufficient amount to  
130 make payments specified by this section. The Department shall  
131 request release of funds pursuant to chapter 216, Florida  
132 Statutes.

133 (7) The Department of Financial Services shall purchase  
134 the annuity or make other such payment as required by this act  
135 pursuant to authority granted by the Legislature for the benefit  
136 of the claimant. Purchase of the annuity or other such payment  
137 as required by this act shall be made within 90 days after the  
138 appropriation has become effective.

139 Section 5. If the claimant has not executed the release  
140 and waiver pursuant to Section 4(3), the claimant is not  
141 precluded from filing a claim bill in accordance with the  
142 current Rules of the House of Representatives and the Rules of  
143 the Senate, which shall be the sole redress of any dispute  
144 regarding any part of this act.

Amendment No. (for drafter's use only)

145  
146       Section 6. Any claimant who is compensated pursuant to  
147 this act shall also have tuition and fees waived for up to a  
148 total of 120 hours of instruction at any career center  
149 established pursuant to s. 1001.44, Florida Statutes, any  
150 community college established under part III of chapter 1004,  
151 Florida Statutes, or any state university. For any educational  
152 benefit made, the claimant is required to meet and maintain the  
153 regular admission requirements of, and be registered at, such  
154 career center, community college, or state university and make  
155 satisfactory academic progress as defined by the educational  
156 institution in which the claimant is enrolled.

157  
158       Section 7. Notwithstanding any provision of s. 943.0585,  
159 Florida Statutes, any claimant who is compensated pursuant to  
160 this act shall be appointed a public defender from the circuit  
161 in which the claimant currently resides, to provide legal  
162 assistance with any action required to judicially and  
163 administratively expunge the claimant's non-judicial criminal  
164 record arising from his or her wrongful conviction. If the  
165 claimant does not wish to use the services of a public defender,  
166 the appointment of the public defender shall end immediately. A  
167 government entity may not charge or impose a fee for the  
168 implementation of any part of this section.

169       Section 8. The Legislature shall not be deemed by this act  
170 or by the payment of any claim to have waived any defense of  
171 sovereign immunity or to have increased the limits of liability  
172 on behalf of the state or any person subject to the provisions  
173 of s. 768.28, Florida Statutes, or any other law.

174       Section 9. Any amount awarded by this act is intended to  
175 provide the sole compensation for any and all present and future

Amendment No. (for drafter's use only)

176 claims arising out of the factual situation in connection with  
177 the claimant's conviction and imprisonment. No further award for  
178 attorney's fees, lobbying fees, costs, or other similar expenses  
179 shall be made by the state.

180  
181 Section 10. This act shall take effect July 1, 2008.  
182  
183  
184

185 -----  
186 T I T L E A M E N D M E N T

187 Remove the entire title and insert:

188 A bill to be entitled

189 An act relating to compensation for wrongful  
190 incarceration; creating the "Victims of Wrongful  
191 Incarceration Compensation Act"; defining "actually  
192 innocent"; providing that a person who has been wrongfully  
193 convicted of a felony offense and incarcerated within the  
194 Department of Corrections as a result of that conviction  
195 may be financially compensated if determined to be  
196 eligible; providing conditions which constitute  
197 eligibility for compensation under the act; providing for  
198 judicial finding of eligibility and amount of  
199 compensation; providing for judicial findings as to  
200 attorney's fees and costs; providing criteria for judicial  
201 findings; providing for legislative redress; providing  
202 duties of the Department of Financial Services and the  
203 Chief Financial Officer; requiring a specific request  
204 regarding release of funds; authorizing the Department of  
205 Financial Services to make specified payments; requiring  
206 an executed release and waiver as a condition precedent to

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

207 tender of payment; providing that payment shall be made  
208 pursuant to specific appropriation provided to the  
209 Department of Financial Services; providing for waiver of  
210 specified tuition and fees for claimants compensated under  
211 the act; providing requirements with respect to  
212 educational benefits; authorizing the appointment of a  
213 public defender to assist with the process of expunging  
214 specified records; prohibiting government entities from  
215 charging fees for the implementation of the expungement  
216 provisions; providing that the Legislature is not deemed  
217 to have waived any defense of sovereign immunity nor  
218 increased the limits of liability as a result of the act  
219 or the payment of a claim thereunder; providing  
220 legislative intent with respect to amounts awarded under  
221 the act; providing an effective date.

222

223 WHEREAS, the Legislature recognizes that no system of  
224 justice is impervious to human error, and

225 WHEREAS, *United States v. Hasting*, 461 U.S. 499 (1983),  
226 reads, in part, "Given the myriad safeguards provided to assure  
227 a fair trial, and taking into account the reality of the human  
228 fallibility of the participants, there can be no such thing as  
229 an error-free, perfect trial, and . . . the Constitution does  
230 not guarantee such a trial.", and

231 WHEREAS, the Legislature acknowledges that the state's  
232 system of justice infrequently yields imperfect results which  
233 may have tragic consequences, and

234 WHEREAS, this act is based on a moral desire to acknowledge  
235 those who are wrongfully convicted of a felony offense,  
236 incarcerated as a result of that conviction, and determined to

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

237 be actually innocent and is not a recognition of a  
238 constitutional right or violation, and

239 WHEREAS, the Legislature intends that any compensation made  
240 pursuant to this act acknowledges the fact that the claimant  
241 suffered significant damages unique to the claimant which  
242 resulted from his or her physical restraint and the deprivation  
243 of freedom; and

244 WHEREAS, the Legislature intends that any compensation made  
245 pursuant to this act be the sole compensation to be provided by  
246 the state for any and all present and future claims arising out  
247 of the factual situation in connection with the claimant's  
248 conviction and imprisonment, NOW, THEREFORE,

249  
250

**PCB SSC**

**08-02**



**HOUSE OF REPRESENTATIVES TRUST FUND RE-CREATION STAFF ANALYSIS**

**BILL #:** PCB SSC 08-02                      Federal Grants Trust Fund in the Parole Commission

**SPONSOR(S):** Safety & Security Council and Representative Kravitz

**TIED BILLS:**    **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Safety & Security Council		Davis <i>DM</i>	Havlicak <i>RH</i>
1)			
2)			
3)			
4)			
5)			

**I. SUMMARY**

Section 19(f), Article III of the Florida Constitution governs the creation of trust funds. It provides that no trust fund of the state or other public body may be created without a three-fifths vote of the membership of each house of the Legislature in a separate bill for that purpose only.

The Florida Constitution also specifies that state trust funds shall terminate not more than 4 years after the effective date of the act authorizing the initial creation of the trust fund, unless the Legislature by law sets forth a shorter time period.

The bill recreates the Federal Grants Trust Fund in the Parole Commission effective July 1, 2008 and provides for continuation of current fund sources and uses of the trust fund.

The bill recreates a trust fund; therefore it must pass with a three-fifths vote of the membership of each house of the Legislature.

The bill has no fiscal impact.

## II. SUBSTANTIVE ANALYSIS

### A. PRESENT SITUATION:

#### 1. MAJOR STATUTES THAT CONTROL THE TRUST FUND:

The creation, recreation and termination of trust funds are governed by provisions in both the Florida Constitution and the Florida Statutes (F.S.).

Section 19(f), Article III of the Florida Constitution governs the creation of trust funds. It provides that no trust fund of the state or other public body may be created without a three-fifths vote of the membership of each house of the Legislature in a separate bill for that purpose only.

The Florida Constitution also specifies that state trust funds shall terminate not more than 4 years after the effective date of the act authorizing the initial creation of the trust fund, unless the Legislature by law sets forth a shorter time period. Specified trust funds are exempted from this provision.<sup>1</sup>

Section 215.3206, F.S., requires agencies to recommend to the Speaker of the House of Representatives and the President of the Senate whether the trust fund should be terminated or re-created in the year prior to the scheduled termination date of any existing trust fund.

Section 215.32(b), F. S., governs the segregation of trust funds. In order to meet accounting standards established by the Government Accounting Standards Board, this section was amended in 2004 to require that, to the extent possible, each agency shall use certain trust funds as a depository for funds to be used for day-to-day operations for uniform specified purposes. These include the following trust funds:

- Operating trust fund—for program operations funded by program revenues.
- Operations and maintenance trust fund –client services funded by third-party payors.
- Administrative trust fund –for management activities that are departmental by nature and funded by indirect cost earnings and assessments against trust funds.
- Grants and donations trust fund – for allowable grant or donor agreement activities funded by restricted contractual revenue from private and public non-federal sources.
- Agency working capital trust fund – for the operation of data processing centers.
- Clearing funds trust fund – for collections pending distribution to lawful recipients.
- Federal grant trust fund – for allowable grant activities funded by restricted program revenues from federal sources.

The 2004 revision to s. 215.32, F.S., further required any agencies that did not have the trust funds specified above, but used other trust funds for the specified purposes of the above referenced trust fund, to request the creation of the trust fund during the next scheduled review of the agency's trust funds, pursuant to s. 215.3206, F.S.

As a result agencies have been requesting the creation of the above noted trust funds as needed at the time of their required recommendation regarding trust fund recreations or terminations.

Section 947.045, F.S., creates and establishes the purpose of this trust fund.

<sup>1</sup> Exempt are trust funds required by federal programs or mandates; trust funds established for bond covenants, indentures, or resolutions, whose revenues are legally pledged by the state or public body to meet debt service or other financial requirements of any debt obligations of the state or any public body; the state transportation trust fund; the trust fund containing the net annual proceeds from the Florida Education Lotteries; the Florida retirement trust fund; trust funds for institutions under the management of the Board of Governors, where such trust funds are for auxiliary enterprises and contracts, grants, and donations, as those terms are defined by general law; trust funds that serve as clearing funds or accounts for the chief financial officer or state agencies; trust funds that account for assets held by the state in a trustee capacity as an agent or fiduciary for individuals, private organizations, or other governmental units; and other trust funds authorized by the Florida Constitution.

2. BRIEF DESCRIPTION OF THE FUND'S USES OR PURPOSES:

The Federal Grants Trust Fund, administered by the Parole Commission, is a depository for federal grants and shall be used for purposes for which the federal funds were intended. This trust fund shall, unless terminated sooner, be terminated on July 1, 2009.

3. MAJOR SOURCES OF REVENUE FOR THE FUND:

Monies credited to the fund shall consist of receipts from federal grants.

4. TOTAL PROJECTED RECEIPTS INTO THE FUND AND CURRENT YEAR APPROPRIATIONS FROM THE FUND:

There are no current receipts or appropriations from this trust fund.

B. EFFECT OF PROPOSED CHANGES:

The bill recreates the Federal Grants Trust Fund in the Parole Commission effective July 1, 2008. The bill provides for continuation of current fund sources and uses of the trust fund and will continue to be the depository for federal grants.

The bill strikes language that terminates the trust fund as of July 1, 2009.

### III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

This legislation has no fiscal impact on state agencies or state funds, on local governments as a whole or on the private sector. It simply re-creates, without modification, an existing state trust fund and continues the current use of the fund.

### IV. COMMENTS

### V. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

→

PCB SSC 08-02

ORIGINAL

2008

1                                   A bill to be entitled  
 2           An act relating to trust funds; re-creating the Federal  
 3           Grants Trust Fund to be administered by the Florida Parole  
 4           Commission; amending s. 947.045, F.S.; deleting a  
 5           provision relating to termination and review of the trust  
 6           fund; providing an effective date.

7  
 8   Be It Enacted by the Legislature of the State of Florida:

9  
 10           Section 1. (1) The Federal Grants Trust Fund within the  
 11 Parole Commission, FLAIR number 78-2-261, which is to be  
 12 terminated pursuant to Section 19(f), Article III of the State  
 13 Constitution on July 1, 2009, is re-created.

14           (2) All current balances of the trust fund are carried  
 15 forward, and all current sources and uses of the trust fund are  
 16 continued.

17           Section 2. Section 947.045, Florida Statutes, is amended  
 18 to read:

19           947.045 Federal Grants Trust Fund.--The Federal Grants  
 20 Trust Fund is hereby created, to be administered by the Florida  
 21 Parole Commission.

22           (1) Funds to be credited to the trust fund shall consist  
 23 of receipts from federal grants and shall be used for the  
 24 various purposes for which the federal funds were intended.

25           (2) Notwithstanding the provisions of s. 216.301 and  
 26 pursuant to s. 216.351, any balance in the trust fund at the end  
 27 of any fiscal year shall remain in the trust fund at the end of

→

PCB SSC 08-02

ORIGINAL

2008

28 | the year and shall be available for carrying out the purposes of  
 29 | the trust fund.

30 | ~~(3) In accordance with s. 19(f)(2), Art. III of the State~~  
 31 | ~~Constitution, the Federal Grants Trust Fund shall be terminated~~  
 32 | ~~on July 1, 2009, unless terminated sooner. Before its scheduled~~  
 33 | ~~termination, the trust fund shall be reviewed as provided in s.~~  
 34 | ~~215.3206(1) and (2).~~

35 | Section 3. This act shall take effect July 1, 2008.

**PCB SSC**

**08-03**

**HOUSE OF REPRESENTATIVES TRUST FUND RE-CREATION STAFF ANALYSIS**

**BILL #:** PCB SSC 08-03                      Shared County/State Juvenile Detention Trust Fund in the Department of Juvenile Justice

**SPONSOR(S):** Safety & Security Council and Representative Kravitz

**TIED BILLS:**                                      **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Safety & Security Council		Davis <i>DAVIS</i>	Havlicak <i>RH</i>
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

**I. SUMMARY**

Section 19(f), Article III of the Florida Constitution governs the creation of trust funds. It provides that no trust fund of the state or other public body may be created without a three-fifths vote of the membership of each house of the Legislature in a separate bill for that purpose only.

The Florida Constitution also specifies that state trust funds shall terminate not more than 4 years after the effective date of the act authorizing the initial creation of the trust fund, unless the Legislature by law sets forth a shorter time period.

The bill recreates the Shared County/State Detention Trust Fund in the Department of Juvenile Justice effective July 1, 2008 and provides for continuation of current fund sources and uses of the trust fund. It amends an incorrect reference to this trust fund in the Florida Statutes as well.

The bill recreates a trust fund; therefore it must pass with a three-fifths vote of the membership of each house of the Legislature.

The bill has no fiscal impact.

## II. SUBSTANTIVE ANALYSIS

### A. PRESENT SITUATION:

#### 1. MAJOR STATUTES THAT CONTROL THE TRUST FUND:

The creation, recreation and termination of trust funds are governed by provisions in both the Florida Constitution and the Florida Statutes (F.S.).

Section 19(f), Article III of the Florida Constitution governs the creation of trust funds. It provides that no trust fund of the state or other public body may be created without a three-fifths vote of the membership of each house of the Legislature in a separate bill for that purpose only.

The Florida Constitution also specifies that state trust funds shall terminate not more than 4 years after the effective date of the act authorizing the initial creation of the trust fund, unless the Legislature by law sets forth a shorter time period. Specified trust funds are exempted from this provision.<sup>1</sup>

Section 215.3206, F.S., requires agencies to recommend to the Speaker of the House of Representatives and the President of the Senate whether the trust fund should be terminated or re-created in the year prior to the scheduled termination date of any existing trust fund.

Section 215.32(b), F. S., governs the segregation of trust funds. In order to meet accounting standards established by the Government Accounting Standards Board, this section was amended in 2004 to require that, to the extent possible, each agency shall use certain trust funds as a depository for funds to be used for day-to-day operations for uniform specified purposes. These include the following trust funds:

- Operating trust fund—for program operations funded by program revenues.
- Operations and maintenance trust fund –client services funded by third-party payors.
- Administrative trust fund –for management activities that are departmental by nature and funded by indirect cost earnings and assessments against trust funds.
- Grants and donations trust fund – for allowable grant or donor agreement activities funded by restricted contractual revenue from private and public non-federal sources.
- Agency working capital trust fund – for the operation of data processing centers.
- Clearing funds trust fund – for collections pending distribution to lawful recipients.
- Federal grant trust fund – for allowable grant activities funded by restricted program revenues from federal sources.

The 2004 revision to s. 215.32, F.S., further required any agencies that did not have the trust funds specified above, but used other trust funds for the specified purposes of the above referenced trust fund, to request the creation of the trust fund during the next scheduled review of the agency's trust funds, pursuant to s. 215.3206, F.S.

As a result agencies have been requesting the creation of the above noted trust funds as needed at the time of their required recommendation regarding trust fund recreations or terminations.

Section 985.6015, F.S., creates and establishes the purpose of this trust fund.

---

<sup>1</sup> Exempt are trust funds required by federal programs or mandates; trust funds established for bond covenants, indentures, or resolutions, whose revenues are legally pledged by the state or public body to meet debt service or other financial requirements of any debt obligations of the state or any public body; the state transportation trust fund; the trust fund containing the net annual proceeds from the Florida Education Lotteries; the Florida retirement trust fund; trust funds for institutions under the management of the Board of Governors, where such trust funds are for auxiliary enterprises and contracts, grants, and donations, as those terms are defined by general law; trust funds that serve as clearing funds or accounts for the chief financial officer or state agencies; trust funds that account for assets held by the state in a trustee capacity as an agent or fiduciary for individuals, private organizations, or other governmental units; and other trust funds authorized by the Florida Constitution.



2. BRIEF DESCRIPTION OF THE FUND'S USES OR PURPOSES:

The Shared County/State Detention Trust Fund in the Department of Juvenile Justice is a depository for county payments to be used for the costs of predisposition juvenile detention. This trust fund shall, unless terminated sooner, be terminated on July 1, 2009.

3. MAJOR SOURCES OF REVENUE FOR THE FUND:

Monies credited to the fund shall consist of funds from the counties' share of the costs for predisposition juvenile detention.

4. TOTAL PROJECTED RECEIPTS INTO THE FUND AND CURRENT YEAR APPROPRIATIONS FROM THE FUND:

	<b>FY 2007-08 Estimates</b>
Balance July 1, 2007:	\$ 4,976,543
Estimated Revenues:	<del>\$ 101,145,086</del>
Total Funds Available:	\$ 106,121,629
Estimated	
Expenditures:	\$ 101,700,627
Balance June 30,	
2008:	\$ 4,421,002

B. EFFECT OF PROPOSED CHANGES:

The bill recreates the Shared County/State Detention Trust Fund in the Department of Juvenile Justice effective July 1, 2008. The bill provides for continuation of current fund sources and uses of the trust fund and will continue to be the depository for county payments for predisposition detention services provided by the state. Additionally, the bill amends an incorrect reference to this trust fund.

The bill strikes language that terminates the trust fund as of July 1, 2009.

**III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

This legislation has no fiscal impact on state agencies or state funds, on local governments as a whole or on the private sector. It simply re-creates, without modification, an existing state trust fund and continues the current use of the fund.

**IV. COMMENTS**

**V. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

1 A bill to be entitled  
 2 An act relating to trust funds; re-creating the Shared  
 3 County/State Juvenile Detention Trust Fund; amending s.  
 4 985.6015, F.S.; deleting a provision relating to  
 5 termination and review of the trust fund; amending  
 6 Subsection (6) of s. 985.686, F.S.; providing an effective  
 7 date.

8  
 9 Be It Enacted by the Legislature of the State of Florida:

10  
 11 Section 1. (1) The Shared County/State Juvenile  
 12 Dentention Trust Fund within the Department of Juvenile Justice,  
 13 FLAIR number 80-2-685, which is to be terminated pursuant to  
 14 Section 19(f), Article III of the State Constitution on July 1,  
 15 2009, is re-created.

16 (2) All current balances of the trust fund are carried  
 17 forward, and all current sources and uses of the trust fund are  
 18 continued.

19 Section 2. Section 985.6015, Florida Statutes, is amended  
 20 to read:

21 985.6015 Shared County/State Juvenile Detention Trust  
 22 Fund.--

23 (1) The Shared County/State Juvenile Detention Trust Fund  
 24 is created within the department.

25 (2) The fund is established for use as a depository for  
 26 funds to be used for the costs of predisposition juvenile  
 27 detention. Moneys credited to the trust fund shall consist of

→

PCB SSC 08-03

ORIGINAL

2008

28 funds from the counties' share of the costs for predisposition  
 29 juvenile detention.

30 ~~(3) In accordance with s. 19(f)(2), Art. III of the State~~  
 31 ~~Constitution, the Shared County/State Juvenile Detention Trust~~  
 32 ~~Fund shall, unless terminated sooner, be terminated on July 1,~~  
 33 ~~2009. Before its scheduled termination, the trust fund shall be~~  
 34 ~~reviewed as provided in s. 215.3206(1) and (2).~~

35 Section 3. Subsection (6) of section 985.686, Florida  
 36 Statutes, is amended to read:

37 985.686 Shared county and state responsibility for  
 38 juvenile detention.--

39 (6) Each county shall pay to the department for deposit  
 40 into the Shared County/State Juvenile Detention Trust Fund  
 41 ~~Juvenile Justice Grants and Donations Trust Fund~~ its share of  
 42 the county's total costs for juvenile detention, based upon  
 43 calculations published by the department with input from the  
 44 counties.

45 Section 4. This act shall take effect July 1, 2008.