

HOUSE BILL REPORT

HB 2221

As Reported by House Committee On:
Judiciary

Title: An act relating to creating a claim for wrongful conviction and imprisonment.

Brief Description: Creating a claim for wrongful conviction and imprisonment.

Sponsors: Representatives Orwall, Appleton, Jinkins, Pollet, Upthegrove, Roberts and Kagi.

Brief History:

Committee Activity:

Judiciary: 1/12/12, 1/19/12 [DPS].

Brief Summary of Substitute Bill

- Creates a civil cause of action whereby persons wrongly convicted of one or more felonies and incarcerated as a result may bring suit against the county where their conviction occurred and be awarded money damages and compensation.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Eddy, Hansen, Kirby, Orwall and Roberts.

Minority Report: Do not pass. Signed by 4 members: Representatives Shea, Assistant Ranking Minority Member; Klippert, Nealey and Rivers.

Staff: Omeara Harrington (786-7136).

Background:

For various reasons, a person who has been convicted of a crime may have his or her criminal conviction overturned. The Innocence Project, a nonprofit legal clinic that offers legal assistance to people wrongly convicted, reports that there have been 280 post-conviction DNA exonerations in United States history.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Persons wrongly convicted of federal crimes are authorized by federal statute to bring an action for damages in the United States Court of Federal Claims. In 2004 Congress increased the damage award limit for persons who successfully bring a claim for wrongful conviction of a federal crime to up to \$100,000 for death row exonerees and \$50,000 a year for non-death row exonerees.

Along with the federal government, the District of Columbia and 27 states have compensation statutes of some form. Washington law does not currently provide for a civil cause of action specific to compensation for persons wrongfully convicted and incarcerated.

Summary of Substitute Bill:

A civil cause of action is established by which persons wrongly convicted of felonies in state court may bring suit against the county in which they were convicted and be awarded money damages and compensation for their wrongful conviction and incarceration.

Who May Bring a Claim.

A person who has been convicted in Washington and imprisoned for one or more felonies of which that person is actually innocent may file a claim for compensation. A person is actually innocent of a felony if the person did not engage in any of the illegal activity alleged in the accusatory instrument. A person is wrongly convicted if that person was charged, convicted, and imprisoned for one or more felonies of which the person is actually innocent. If the claimant is incapacitated, a minor, or a nonresident, an agent may file the claim on behalf of the claimant. If the claimant is deceased, the claim survives to the personal representative of the deceased claimant.

Establishment of Claim.

The claim must be brought in superior court and named counties are to be represented by the Attorney General. In order to file an actionable claim, a claimant must establish by documentary evidence that:

- the claimant has been convicted of one or more felonies in state court and served all or part of a corresponding sentence of imprisonment;
- the claimant is not currently incarcerated for any offense;
- the claimant is not seeking compensation for any period of imprisonment during which they were simultaneously imprisoned on a concurrent sentence for a crime other than the felony or felonies that form the basis of the claim;
- the claimant has been pardoned on grounds consistent with innocence for the felony or felonies upon which the claim is based; or, as a result of significant new exculpatory information, the judgment of conviction was reversed or vacated and the accusatory instrument dismissed, the wrongly convicted person was found not guilty at a new trial, or the wrongly convicted person was not retried and the accusatory instrument was dismissed; and
- the statute of limitations has not run.

The claim must also set out the following factual assertions in sufficient detail:

- the claimant did not engage in any illegal conduct alleged in the accusatory instrument; and
- the claimant did not commit perjury or fabricate evidence to bring about the conviction.

A guilty plea to a crime the claimant did not commit or a false confession will not constitute perjury; however these facts may be considered by the trier of fact.

Convictions vacated, overturned, or subject to re-sentencing pursuant to *In re: Personal Detention of Andress* do not qualify as the basis of a compensation claim unless all other qualifying criteria are met.

The claimant must verify the claim.

Unless the Attorney General concedes, any claim not meeting the filing criteria set out above will be dismissed by the court. The court must set forth its reasons for dismissal in findings of fact and conclusions of law.

The standard of proof is a proof by clear and convincing evidence.

A person accepting compensation under this act forfeits any other state claim related to the underlying wrongful conviction. The claimant is not precluded from bringing a federal claim; however, if a federal award is granted based on the wrongful conviction, any entity providing compensation under this act will be reimbursed to the full extent of the federal award or the full amount received by the claimant under this act, whichever is less.

Money Damages.

Counties are responsible for money damages. If the county fails to satisfy the damage award within 180 days, the state will satisfy the award and seek reimbursement from the county. Counties are not precluded from satisfying the damage award through their risk pool or insurance coverage. The damages award includes the following:

- \$50,000 for each year in actual incarceration (including pre-trial incarceration);
- \$50,000 (additional) for each year spent on death row;
- \$25,000 for each year on parole, community custody, or as a registered sex offender;
- reimbursement for restitution, assessments, fees, and court costs associated with the underlying wrongful conviction; and
- attorneys' fees for bringing the wrongful conviction claim, not to exceed \$75,000.

Other compensation includes:

- waiver by the state of interest on child support arrearages that accrued while incarcerated;
- higher education tuition waivers for Washington's state universities and colleges for the claimant and the claimant's children and step-children if they are domiciled in Washington;
- up to 10 years of eligibility under an existing non-employee eligibility type for the claimant, their spouse or domestic partner, and their dependent children to participate, premium free, in Public Employees' Benefits Board health and dental insurance programs; and

- access to reentry services, upon the claimant's request.

The award cannot be offset by costs the state (or any political subdivision of the state) incurred in prosecuting and incarcerating the wrongly convicted person. The award cannot include punitive damages and will not be considered income for tax purposes.

A court must seal the wrongly convicted person's record of conviction upon a finding of wrongful conviction. Upon the claimant's request, the court may order the conviction record vacated.

Notice.

When a person's conviction has been reversed or vacated or other similar judicial relief has been granted on grounds consistent with innocence, the court must provide the person with a copy of this act.

Statute of Limitations.

The claim must be brought within three years from pardon, grant of judicial relief, release from custody, or effective date of this act, whichever is latest. If the wrongly convicted person is not given proper notice of the act they have an additional 12 months to file.

Right of Appeal.

Wrongful conviction claimants will have the right to appeal. Review of a superior court dismissal is *de novo*.

Substitute Bill Compared to Original Bill:

The compensation and damage award was changed in the following ways:

- Compensation for child support payments owed by the claimant that became due while the claimant was in custody as a result of the wrongful conviction was removed from the award. The requirement that funds must be paid in a lump sum on the claimant's behalf to the Department of Social and Health Services for distribution was also removed. Under the substitute bill, the state must waive any interest on child support arrearages that accrued while the wrongly convicted person was in custody for the felony or felonies upon which the wrongful conviction claim is based.
- The substitute bill designates that enrollment in health care benefits will only be ordered at the claimant's request. The claimant will have no responsibility for Public Employee Benefits Board health and dental premiums, rather than having no responsibility for costs associated with participation. The claimant's spouse or registered domestic partner is included in the list of those not responsible for health and dental premiums. The substitute bill also specifies that the Health Care Authority is directed to enroll the claimant an appropriate "non-employee" eligibility type.
- The amount of money damages is fixed, rather than constituting a floor.

Claims are to be brought against the county of conviction rather than the county of prosecution.

A provision was added stating that counties are not precluded under the act from satisfying the compensation award obligation through their risk pool or insurance coverage.

The standard of proof was raised from proof by a preponderance of the evidence to proof by clear and convincing evidence.

There is an added requirement that, if the claim is based, in part, on action taken as a result of significant new information, such as a reversal, vacation of a conviction, or a new trial, the significant new information must have been exculpatory.

The substitute bill removes the prohibition against a county defending on grounds that there was an agreement whereby the prosecutor's office or an agent of the prosecutor agreed to refrain from certain action if the accused agreed to not pursue a claim. Evidence of such an agreement is admissible, but not dispositive.

Several other changes were made for technical correctness and clarity.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is a bill about fairness and justice. There are three courageous men who were wrongly convicted for crimes they did not commit, locked up for a total of 48 years, and later exonerated. They had their lives shattered. Everyone in this country is entitled to life, liberty, and the pursuit of happiness, but these men lost everything and they were institutionalized and victimized. They suffer even after they have been found innocent because when a person is exonerated they have nothing.

Washington is in minority of states that do not provide compensation. If this passes, our state will be the first in the nation to waive tuition for children. The current fault process, which proceeds under federal civil rights statutes, is located at the county level. There is one such case pending right now. These cases are time consuming and costly, with the median award being \$3 million, and this new cause of action could be an alternative. Where there is no fault, resources are harder to tap into than they would be for fault-based claims. The potential claimants are done dealing with the court system and they need help immediately. We are hoping that this system will encourage settlement of these claims. The current economic crisis is not an excuse to not pass this bill. Just as when private property is taken for public use and the government must provide compensation, we do not have a right to sit on our hands while people suffer.

There are people who have been wrongly convicted and imprisoned in Washington for a decade or more for crimes they did not commit. Some are targeted in prison because the crime they were wrongly convicted of was particularly egregious. One person wrongly

convicted in Washington served his entire sentence and later had his conviction overturned. Later, prosecutors re-filed charges for the same crime and he was acquitted at trial. Life is difficult for those who have been exonerated due to the trauma, the gap in work history, the lost time with family, and having to rely on others for financial support.

(Opposed) There is an inability to respond to certain injustices in our state and while we hope to work together to find a remedy, we cannot back the arbitrary decision to impose cost on the county. There is no nexus to county fault. Prosecutors file cases on behalf of the state and the filing standard set in statute. If a prosecutor is not doing their job, the Governor has a duty to have the Attorney General look into it. The Legislature can vote to remove a prosecutor. These are state cases. These are no fault cases because they are statistically due to faulty eyewitness. The Legislature is not going to create a cause of action against those who falsely identified others. If the state wants to provide this solution for state cases the state needs to pay for it. It is not going to be that much and it will not kill the budget to do this.

This bill does not create an alternative to expensive civil rights litigation; it incentivizes both. There can still be a federal civil rights action simultaneously or in the future. The language needs to be tightened up. Although *Andress* cases are exempted, in situations in which an illegal activity later becomes a legal activity, this will create a basis for claims. Allowing the statute of limitations to run from the "release from custody" could create a situation where people wait to file.

These costs are not insignificant given that the number of years that will have to be compensated is in the 40s. That initial payment is just the tip of the iceberg. This level of compensation seems significantly higher than in past versions.

While waiving tuition reduces the burden on people wrongly convicted, the college would still be responsible for paying for the education. The burden is shifted to other students in higher tuition.

Persons Testifying: (In support) Representative Orwall, prime sponsor; Ted Bradford; Alan Northrop; and Lara Zarowsky, Caroline Bercier, and Thomas Hudson, Innocence Project Northwest.

(Opposed) Tom McBride, Washington Association of Prosecuting Attorneys; Lana Weinmann, Office of the Attorney General; Brian Enslow, Washington Association of Counties; and Nick Lutes, State Board for Community and Technical Colleges.

Persons Signed In To Testify But Not Testifying: None.