

Michigan's Pending Compensation Law Is Anti-Exoneree Political Window Dressing

Justice Denied Editorial
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The Michigan State Senate has passed 37 to 0 a bill that provides as little money as possible to a select group of exonerated persons -- while leaving the majority of exonerated persons out to dry with nothing.[n.1] Senate Bill 291, referred to as the "Wrongful Imprisonment Compensation Act," is political window dressing that creates the misleading appearance the State of Michigan is trying to responsibly address the issue of providing reasonable compensation to wrongly convicted persons.

The best that can be said for SB 291 is that it is ill-conceived by persons unfamiliar with the subject of wrongful imprisonment compensation. The worst that can be said is that it is a mean-spirited deliberate attempt to minimize the compensation that could be awarded only to the minority of exonerated persons: those whose conviction is overturned by new evidence.

As described below, SB 291 is so discriminatory and inherently defective that the bill should be immediately scraped. From the ground up it should be rewritten to genuinely address the financial welfare of all persons the State has victimized with a conviction that has been blotted out by a court or gubernatorial pardon. It is realistic to do that because the Michigan House of Representatives has not yet voted on SB 291's companion House Bill 4536 (2015).[n.2]

If the political will doesn't currently exist to correct SB 291 -- and likewise HB 4536 -- then it should be withdrawn and nothing done regarding wrongful conviction compensation at this time. As with all legislation, once SB 291 is enacted, its numerous shortcomings will be set in stone as law and it will be almost impossible to make any meaningful correction to its provisions.

SB 291 is the worst kind of political posturing because it allows politicians and prosecutors to publicly appear to support meaningful compensation to wrongfully convicted persons -- while not actually doing so.

The following are some of the more objec-

tionable parts of Michigan's deceptively named "Wrongful Imprisonment Compensation Act." Those parts are underlined in italics, and are followed by comment about the deficiency:

Sec. 5. (1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by clear and convincing evidence:

(a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.

Comment: Excluded from compensation are wrongly convicted persons who are incarcerated after their conviction, but exonerated prior to their sentencing. Since 1989 there have been at least two people in Michigan exonerated prior to their sentencing, and 135 nationally.[n.3]

Sec. 5. (1)(b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. ...

Sec. 5. (1)(c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.

Comment: 5.(1)(b) and 5.(1)(c) are incongruent. Persons are regularly exonerated without "new evidence." [n.4] In 2015 the majority of the 316 known exonerations in the U.S. were not based on new evidence: less than 50% were based on new evidence.[n.5] Yet all persons exonerated without "new evidence" are automatically excluded by SB 291 from being eligible for compensation.

Directly regarding Michigan: At least 82 people have been judicially exonerated by a Michigan state court since 1950.[n.6] Since the bill only applies to a living exoneree, it doesn't seem likely there are any alive who were convicted prior to 1950. Over half of those 82 people were not judicially exonerated by new evidence. They are left out in the cold by the "Wrongful Imprisonment

Compensation Act."

In addition, at least 61 people in Michigan have been granted a full gubernatorial pardon since 1950 that had the effect of vacating their conviction and restored their presumption of innocence exactly the same as a judicial exoneration.[n.7] Without a pardon based on new evidence they are excluded from compensation under SB 291.

So more than 100 people in Michigan who have had their presumption of innocence restored by way of a court proceeding or a gubernatorial pardon are excluded from being granted compensation under the pending "Wrongful Imprisonment Compensation Act." That is more than 70% of the known exonerated people in Michigan. All of those people are as legally innocent of the crime(s) they were convicted of committing as every person reading this.

Additional Comment: It is unnecessary and redundant to apply the clear and convincing evidence standard to 5.(c). The legal presumption of innocence applies to every defendant involved in a case where the State's inability to prove a defendant committed a crime by proof beyond a reasonable doubt underlies the dismissal of an indictment or information; the defendant was acquitted after a trial; or a trial or appellate court rules that the guilty verdict cannot stand because the prosecution failed to introduce sufficient evidence to prove the defendant's guilt beyond a reasonable doubt. The State cannot prove the defendant "perpetrate[d] the crime and was not an accomplice or accessory to the acts that were the basis of the conviction ...", yet SB 291 imposes the requirement that a claimant must prove the negative of not doing something that it has already been legally established the State cannot prove beyond a reasonable doubt that the person did.

If a standard is imposed, it makes more sense to rely on the "balance of probabilities" test that a person did not commit the crime, which is relied on under New Zealand's compensation scheme for wrongful conviction and imprisonment.[n.8] That is a stronger test than the *less than a probability* of a constitutional violation that is relied on to overturn a conviction based on either the prosecution illegally withholding favorable evidence (*Brady v. Maryland*,

Michigan Comp cont. on p. 14

Michigan Comp cont. from p. 13

373 U.S. 83 (1963)), or ineffective assistance of counsel by a defendant's trial or appellate lawyer (*Strickland v. Washington*, 466 U.S. 668 (1984)).

Sec. 5. (2) Subject to subsections (4) and (5), if a court finds that a plaintiff was wrongfully convicted and imprisoned, the court shall award compensation as follows:

(a) Fifty thousand dollars for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison, regardless of whether the plaintiff was released from imprisonment on parole or because the maximum sentence was served.

Comment: Fifty thousand dollars per year of imprisonment is not a progressive amount for 2016, and much less than half of what is awarded overall by Texas: \$80,000 per year plus an annuity for life based on the lump sum payment.[n.9] Furthermore, \$50,000 is less than 22% of the average of \$232,947 per year that New York awarded in 2014 and 2015 to 13 exonerated persons,[n.10] under New York's "Unjust Conviction and Imprisonment Act" enacted in 1984. [n.11] While there are a number of states that pay \$50,000 or less per year,[n.12] they are likewise not progressive with current norms of what constitutes adequate compensation.

Looking abroad, New Zealand's wrongful conviction compensation legislation enacted in 1998, provides a base of \$100,000 for each year in custody for non-pecuniary losses that include loss of liberty or emotional harm – plus payments for pecuniary losses following conviction that include loss of livelihood and future earnings.[n.13] The flexibility of New Zealand's compensation scheme that is applied on a case-by-case basis, has resulted in an average payment of \$261,284 per year of imprisonment.[n.14]

SB 291 cannot be considered to provide progressive compensation without being written to allow payments comparable to Texas, and preferably those in New York.

Additional Comment: It is unconscionable that SB 291 excludes compensation to an exoneree for the time he or she spent as a registered sex offender after

release from prison. As a registered sex offender a person is restricted where he or she can live and work, and even the types of public events the person can attend. Texas recognizes the injustice that an exoneree was required to register as a sex offender, and specifically awards compensation of \$25,000 per year or part thereof for the time an exoneree was required to do so after release from prison.[n.15]

Additional Comment 2: SB 291's exclusion from compensation the time an exoneree spent in State custody after release from prison reflects a profound lack of understanding about the negative impact that being on parole can have on a person's ability to find employment, housing, and even develop meaningful interpersonal relationships. Awarding compensation for an exoneree's time on parole is a financial acknowledgement of the destructive effect parole had on the exoneree's life. This would be exceptionally progressive, and in line with Texas, which awards compensation of \$25,000 per year or part thereof for the time an exoneree was on parole. If a parolee also registered as a sex offender, then Texas awards the exoneree a total of \$25,000 per year for both injustices.[n.16]

Sec. 5. (2) (c) Reasonable attorney fees incurred in an action under this act. All of the following apply to attorney fees under this act:

(i) The court shall not award attorney fees unless the plaintiff has actually paid the amount awarded to the attorney.

(ii) It is not necessary that the plaintiff pay the attorney fees before an initial award under this act. The court may award attorney fees on a motion brought after the initial award.

(iii) The attorney fees must not exceed 10% of the total amount awarded under subdivisions (a) and (b) or \$50,000.00, whichever is less, plus expenses.

Comment: Creates the convoluted situation that a destitute exoneree must hire an attorney with the proviso that the attorney will be paid from a successful claim. After the attorney is paid from the exoneree's award, a motion is submitted for reimbursement of the attorney fees with a cap of 10% of the total award or \$50,000, whichever is less. If the capped fee is less than what the exoneree paid the lawyer, then the exoneree wouldn't recover the total amount he or she paid in attorneys fees.

Sec. 5. (7) An award of compensation under this act is not a finding of wrongdoing against anyone. An award of compensation under this act is not admissible in evidence in a civil action that is related to the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.

Comment: This is inconsistent with the fact that an award of compensation is legally significant because the bill requires that for compensation to be granted it must be found by clear and convincing evidence that the claimant "did not perpetrate the crime and was not an accomplice or accessory ..." -- and hence the award has relevance "to the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment."

Sec. 5. (11) A compensation award under this act is subject to the payment of child support, including child support arrearages, owed by the plaintiff. Child support must be deducted from an award under this act before the plaintiff receives any of the money from the award.

Comment: This financially punishes a person for being unable to pay child support because of his or her imprisonment by the State. It is logical that Michigan would add any child support payments that accrued during a person's wrongful imprisonment to their compensation. That is exactly what Texas does by adding to an exoneree's payment, "compensation for child support payments owed by the person on whose imprisonment the claim is based that became due and interest on child support arrearages that accrued during the time served in prison but were not paid." [n.17]

Sec. 5. (13) An award of compensation under this act is subject to setoff or reimbursement for damages obtained for the wrongful conviction or imprisonment from any other person.

Comment: Sec. 5 (13) is unconscionable in its implications. If a person was coerced or even outright tortured by the police into a false confession that implicated another person who was also wrongly convicted, then the State can be taken off the hook in whole or part for the compensation awarded to the wrongly implicated person by having it paid from the award to the false confes-

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Michigan Comp cont. from p. 14

sor, or by requiring that he or she “reimburse” all or part of the money awarded to the person he or she was coerced into implicating!

There is one provision of Senate Bill 291 that can be commended as forward thinking.

Sec. 5. (6) In the discretion of the court, the total amount awarded under subsection (2)(a) and (b) may be paid to the plaintiff in a single payment or in multiple payments. If the court orders the compensation to be paid in multiple payments, the initial payment must be 20% of the total amount awarded or more and the remainder of the payments must be made over not more than 10 years.

Comment: This provision can keep a person from quickly blowing all the money he or she is awarded or having others leech it from him or her in short order, and then be left with nothing. (E.g., The author is aware of one exonerated who was paid a lump sum of \$250,000 and frittered away all the money in less than a month.)

Endnotes:

1. The Michigan Senate voted on June 9, 2016. Michigan Legislature, Senate Bill 0291 (2015), online at <http://www.legislature.mi.gov/%28S%28h2wxqfx1obflxnliambvrn%29%29/mileg.aspx?page=GetObject&objectname=2015-SB-0291>.
2. Michigan Legislature, House Bill 4536 (2015), online at, <http://www.legislature.mi.gov/%28S%28z20epwb5xq1idmkl4npbr5wb%29%29/mileg.aspx?page=BillStatus&objectname=2015-HB-4536>.
3. Innocents Database, <http://forejustice.org/innocentsdatabase.htm>.
4. For example, a person can be acquitted after a retrial in which the same evidence was heard, but in the first trial the judge erred by either omitting or improperly giving one or more jury instructions that was corrected in the second trial.
5. See, Hans Sherrer, “2015 Innocents Database Exoneration Report,” *Justice Denied*, May 25, 2016, online at, <http://www.justicedenied.org/2015idbrepor.html>. Less than 150 of the 316 known exoneration in 2015 were based on new evidence.
6. There are eight known judicial exoneration in Michigan of persons convicted between 1950 and 1988, and 74 from 1989 to 2015.
7. There are 15 known full gubernatorial

pardons in Michigan of persons convicted between 1950 and 1988, and 46 from 1989 to 2015. The Michigan Supreme Court has ruled an executive pardon in Michigan “reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.” *People v. Stickle*, 156 Mich. 557, 564, 121 N.W. 497 (1909) (Cited in *People v. Van Heck*, 252 Mich. App. 207, 651 NW 2d 174 (Mich. Ct. of Appeals 9-24-2002))

8. “Compensation for wrongful conviction and imprisonment,” New Zealand Ministry of Justice, online at,

<http://www.justice.govt.nz/services/miscarrriages-of-justice/compensation-for-wrongful-conviction-and-imprisonment>.

9. Texas state “Civil Practice And Remedies Code; Title 5. Governmental Liability; Chapter 103. Compensation To Persons Wrongfully Imprisoned; Sec. 103.052. Lump-Sum Compensation, and Sec. 103.053. Annuity Compensation Generally. Online at, <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.103.htm>.

10. The 13 imprisoned for a total of 189 years, were awarded a total of \$44,020,000 in compensation. See, Hans Sherrer, “\$369 Million Compensation Awarded In 2014 And 2015 To Wrongly Convicted In U.S,” *Justice Denied*, June 8, 2016, online at <http://justicedenied.org/wordpress/archives/3215>.

11. New York Court of Claims Act § 8-b. Claims for unjust conviction and imprisonment.

12. The federal government’s wrongful imprisonment compensation statute pays \$50,000 per year to non-capital defendants, and \$100,000 per year of imprisonment to a person who was sentenced to death.

13. “Compensation for wrongful conviction and imprisonment,” New Zealand Ministry of Justice, online at, <http://www.justice.govt.nz/services/miscarrriages-of-justice/compensation-for-wrongful-conviction-and-imprisonment>.

14. A total of \$2,732,514 has been paid to nine exonerees for 10.46 years of imprisonment. All data compiled from the Innocents Database,

<http://forejustice.org/innocentsdatabase.htm>.

15. Texas State “Civil Practice And Remedies Code; Title 5. Governmental Liability; Chapter 103. Compensation To Persons Wrongfully Imprisoned; Sec. 103.052 (b). Online at, <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.103.htm>.

16. *Id.*

17. *Id.*, Sec. 103.052 (2). Online at, <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.103.htm>.

Sources:

[Michigan Legislature](#), Senate Bill 0291 (2015)



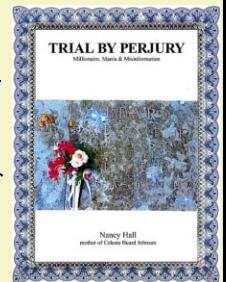
Database of Japanese Cases

The Japan Innocence & Death Penalty Information Center has a database of wrongful Japanese convictions online at, <http://www.jiadep.org>

Trial by Perjury: Millionaire, Mania & Misinformation

by Nancy Hall

This \$3.99 [Amazon Kindle e-book](#) book is about how Celeste Beard Johnson was convicted in 2003 of capital murder in the death of her then husband Steven F. Beard, who died of natural causes in 2000. She was sentenced to life in prison.



While in bed at home in Oct. 1999, Steven was shot in his stomach with a shotgun. Tracey Tarlton, a woman who became infatuated with Celeste after they met in February 1999, admitted the shooting and she was charged with Injury to an Elderly Person. Steven recovered and was discharged from the hospital on January 18, 2000. The next day he was readmitted with a yeast infection and he complained of chest pains. Exams showed he had severe heart disease and other medical problems. He died four days later. Tarlton and Celeste were charged with murdering Steven. Tarlton pled guilty and agreed to testify against Celeste in exchange for a 10-20 year prison sentence. Celeste was convicted even though medical evidence showed Steven died of natural causes – not murder. Order for the Amazon Kindle for only \$3.99 from [Amazon.com](#). (252 pgs)

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