



**Response to Ohio Prosecuting Attorneys Association Testimony re: H.B. 411
Senate Judiciary Hearing
November 29, 2018**

The Ohio Innocence Project is grateful to the Senate Judiciary Committee for considering H.B. 411 to fix Ohio's wrongful imprisonment compensation statute, and would like to address the concerns and amendments raised by the Ohio Prosecuting Attorneys Association.

Under the current law a person is eligible for wrongful imprisonment compensation if he or she can meet the high burden of offering affirmative proof of actual innocence, or if the wrongful conviction involved any type of error in procedure—meaning a constitutional violation. The law worked as intended from 2003 until the Ohio Supreme Court ruled in the 2014 *Mansaray* decision that an error in procedure must have occurred *after* sentencing or imprisonment, when almost any constitutional violation that would lead to an innocent person being convicted would happen *before* sentencing or imprisonment.

As a result innocent Ohio exonerees like Dale Johnson have been denied compensation. Meanwhile, in 2017 Frank Davis was paid over \$100,000 in state compensation because his cocaine trafficking conviction was overturned on a technicality that had nothing to do with innocence. He was eligible because a judge violated his constitutional rights after sentencing and imprisonment by keeping him incarcerated for an extra six months.

H.B. 411 would limit eligibility for wrongful conviction compensation to only one type of constitutional violation—called a *Brady* violation. It would also clarify that a *Brady* violation could have occurred before or after the conviction and sentencing, which is how the law was implemented from 2003 through 2014.

In contrast to OPAA's testimony, a conviction reversed under *Brady* is consistent with innocence. To overturn a conviction based on a *Brady* violation, a court has to determine that two criteria are met: 1) the prosecution unconstitutionally withheld evidence that was favorable and material to the defendant, and 2) the withheld evidence is so powerful that, viewed in light of the evidence, there is a reasonable probability the defendant would have been acquitted had it been disclosed.

If a person is able to overturn his conviction by uncovering previously withheld evidence and proving that the evidence is so strongly in his favor that he probably would have been acquitted if it had been disclosed, then our legal system's most sacred principle of innocent until proven guilty would be restored. This is extremely difficult burden, which is why, according to the Ohio Court of Claims, ***only one person was able to obtain compensation based on a Brady violation*** during the time that the errors in procedure provision took effect in 2003 until the *Mansaray* decision in 2014.

There is a simple solution to address OPAA's concerns about wrongful imprisonment compensation claims based on *Brady* violations. OPAA can work to ensure that all Ohio prosecutors fulfill their constitutional obligation to disclose *Brady* materials so that defendants can adequately defend themselves. By taking the lead on this issue, OPAA would save the entire system money by avoiding appeals and other post-conviction *Brady* claims, in addition to preventing wrongful convictions and subsequent compensation payments.

OPAA's testimony states that three cases, *State v. Russell* (2011), *State v. Carroll* (2007) and *State v. McKinnon* (2001) are proof that *Brady* violations are inconsistent with actual innocence. However, this interpretation is misleading. When these convictions were overturned, the presumption of innocence was restored. However, once the defendants pleaded guilty that presumption no longer applied and the individuals would be ineligible for compensation.

In addition, OPAA’s explanation of Anthony Lemons case leaves out some critical information. Lemons’ conviction was overturned based on a *Brady* violation. Subsequently, a different judge denied his wrongful imprisonment claim, and in doing so criticized the first court by suggesting that Lemons’ conviction should not have been overturned in the first place based on *Brady*.

A close examination of the first decision, which found the *Brady* violation, reveals that that court failed to apply the “prejudice prong” of *Brady* (the 2nd prong above), and thus, the second court was arguably correct in pointing out this error and criticizing the first court for finding a *Brady* violation. The State, however, did not appeal the arguably erroneous decision that found a *Brady* violation. Rather, it defaulted on what likely would have been a meritorious appeal, as the second court implicitly realized. Thus, in the end, *Lemons* is a case of judicial error, and the State failing to correct it through the appellate process. If we draft legislation around a one-off possible judicial disagreement or court error, there would be no point in passing any law since a judge could theoretically misapply it.

Amendments

For OPAA’s proposed Amendment 2949, we certainly share concerns about protecting against exorbitant attorneys fees. Attorney costs start to mount if the prosecution contests a compensation claim and the exoneree’s counsel has to essentially prepare for a trial, which can include bringing in expert witnesses and incurring other costs.

We would certainly be open to discussing reasonable caps on attorneys’ fees in the future. However, this is a major issue that deserves careful vetting and stakeholder input. To suggest an amendment for the first time in November 2018, when the legislation was introduced in November 2017 and has already passed the House, is far too late.

Amendment 2950 is also problematic because it sets the time limit to file for compensation from when the "cause of action accrued" which is vague. If an exoneree files for compensation based on a *Brady* violation, the prosecutor could argue the cause of action accrued when the *Brady* violation was discovered, rather than when the exoneration occurred. For example, the Ohio Innocence Project had a recent exoneration in which a *Brady* violation was discovered in 2007, but the person wasn’t exonerated until 2017. Under this amendment, the exoneree could have been required to file when the *Brady* violation was discovered in 2007, before he was officially exonerated.

In addition, this amendment seems to be designed to bar the exonerees who have been unable to obtain compensation under *Mansaray*. If an exoneree’s conviction was overturned because of a *Brady* violation in 2015, but he did not file because of *Mansaray*, then this language would be used in an attempt to bar his recovery because his statute of limitations would have ended in 2017. That is at odds what the drafters of this bill are attempting to achieve.

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H.B. 411 would fix Ohio’s wrongful incarceration compensation statute so that it provides the wrongfully convicted with resources to rebuild the lives that were unjustly taken from them by the state. In addition, it protects taxpayers by limiting the types of “errors in procedure” that are eligible for compensation and implementing a provision to offset state compensation payments with any civil awards stemming from the wrongful conviction. The Ohio Innocence Project appreciates time and work that members of the Senate Judiciary Committee have dedicated to this legislation and hope you will vote in to pass it.