



Response of the Ohio Innocence Project and the Innocence Project to Cuyahoga County Prosecuting Attorney's Office's Testimony on House Bill 411

The Ohio Innocence Project would like to address claims made in the testimony submitted by the Cuyahoga County Prosecuting Attorney's Office's regarding H.B. 411.

1. **Claim:** If enacted, H.B. 411 would broaden and expand Ohio's wrongful imprisonment statute's eligibility requirements to make it the most liberal and all-encompassing in the United States.

Response: H.B 411 maintains current provisions in Ohio's wrongful imprisonment compensation law, which is far from the most liberal in the nation.

- **Ohio provides \$52,625 per year of wrongful incarceration,¹ which is in line with 16 of the 33 states with wrongful conviction compensation laws that provide at least \$50,000 per year.²** A number of states/jurisdictions provide more than Ohio per year of wrongful incarceration: Texas provides \$80,000, Colorado \$70,000, Kansas \$65,000, Washington D.C \$200,000. H.B. 411 does not change the amount of compensation provided to individuals.
- **Ohio is one of only four states that exclude people who pleaded guilty to crimes from eligibility for compensation.** H.B. 411 does not change that bar on claims from people who pleaded guilty.
- **Fifteen states offer additional social services that Ohio does not, including college tuition assistance, medical expenses, and job search assistance.**
- **The federal compensation law and four states offer additional compensation for years wrongfully spent on death row, parole, probation or sex offender registry, which Ohio's law does not offer.** The federal statute provides an additional \$100,000 per year on death row; Colorado provides an additional \$50,000 per year on death row and \$25,000 per year on parole, probation or sex offender registry; Minnesota provides an additional \$25,000 per year on parole, probation or sex offender registry; Washington State provides additional \$50,000 per year on death row and \$25,000 per year on parole, probation, sex offender registry; and Kansas provides additional \$25,000 per year on parole, post-release supervision or on sex offender registry.

2. **Claim:** All told, if R.C. 2743.48(A)(4) and (A)(5) are changed in the manner contemplated in H.B. 411, the State of Ohio will undoubtedly incur total liabilities somewhere between \$15m and \$20m, as the bill reinstates "error in procedure" liability but purports to limit liability to only when premised upon alleged "Brady violations".

Response:

From 2003-2014 only ONE claimant received state compensation based on a *Brady* violation for \$510,000. From April 9, 2003, when the errors in procedure provision took effect, until the *Mansaray* ruling on March 5, 2014, wrongful incarceration compensation was granted for individuals who could either affirmatively prove actual innocence or that an error in procedure occurred before, during or after

¹ R.C. § 2743.48 (E) (2) (b).

² **10 states' law and the federal statute provide \$50,000 per year of wrongful incarceration:** AL, FL, HI, MI, MN, MS, NJ, NC, WA. **6 states provide > \$50,000 per year of wrongful incarceration** TX: \$80,000, CT: \$50,250-\$134,000, CO: \$75,000, CA: \$51,100, IL: \$85,350-\$199,150, VT: \$30,000-\$60,000

sentencing and imprisonment. According to the Ohio Court of Claims website, during this time, only five petitioners obtained compensation based on procedural errors for a total of \$1.34 million.

Most importantly, only one of those five claims were successful on *Brady* grounds. **For over a decade, only one claimant secured compensation based on a *Brady* violation.** The award of \$510,000 was paid in 2008 (*Ronald Larkins v. State of Ohio*, 2008-11028 WI). **Notably, the compensation in *Larkin*, which arose from a wrongful conviction in Cuyahoga County, was based on a settlement agreement that the State of Ohio entered with Mr. Larkin.**

Furthermore, the bill contains an offset provision that requires exonerees to reimburse the state for compensation paid under the statute if they win civil awards, and visa versa. Under the current law, exonerees can keep the full amount of state compensation regardless of whether they receive civil awards. Ohio taxpayers have paid over \$25 million in civil judgments and settlements stemming from wrongful convictions.³ The offset provision will likely reduce state compensation costs and protect taxpayers.

3. Claim: No other state appears to have such a “strict liability” *Brady* violation method to qualify as “wrongfully imprisoned.”

Response: Connecticut’s wrongful conviction compensation law permits eligibility for convictions vacated or reversed due to official misconduct, which would include *Brady* violations. “A person is eligible to receive compensation for wrongful incarceration if the complaint or information dismissed on grounds of innocence, or the complaint or information dismissed on a ground citing an act or omission that constitutes malfeasance or other serious misconduct by any officer, agent, employee or official of the state that contributed to such person's arrest, prosecution, conviction or incarceration.” C.G.S.A. § 54-102uu (a) (2).

4. Claim: H.B. 411 attempts to circumvent qualified and/or prosecutorial immunity under federal law...In 2010, Ohio shifted to open discovery and amended Criminal Rule 16. Thus, this proposed bill is, at best, a costly solution looking for a problem on a going-forward basis. There is already an avenue to address *Brady* violations, that being via existing federal law, 42 U.S.C. § 1983.

Response: H.B. 411 does not impact Ohio’s law on prosecutorial immunity in any way. Moreover, if prosecutors follow the United States Supreme Court’s command in *Brady*, there is no need for immunity based on *Brady* violations if prosecutors and no one in Ohio would need to be compensated for a *Brady* violation. 42 U.S.C. § 1983 does not adequately address the problem of *Brady* violations because, as Mr. Gutkoski notes, individual prosecutors and district attorney offices have absolute immunity and cannot be held civilly liable for withholding evidence under this law.

5. Claim: Michigan and Kansas approached these issues in a thoughtful manner, bringing both sides together with legislative hearings in open session. If you recall, H.B. 411’s legislative repeal was deleted from the budget bill, H.B. 49. Past is prologue. Yet again, this extensive eligibility expansion is being rushed in the lame duck session.

Response: H.B. 411 was introduced in November 2017 and there have been multiple public hearings on the legislation in both the House and Senate.

6. Claim: Not every person who has a conviction overturned based upon a reviewing court scouring the record and declaring certain evidence should have, but may not have been disclosed, should be

³ Jeffrey S. Gutman, An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted, 82 Mo. L. Rev. (2017) Available at: <http://scholarship.law.missouri.edu/mlr/vol82/iss2/7>

automatically entitled to taxpayer money. Reversal of convictions for these reasons is not synonymous with innocence.

Response: 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. A conviction reversed under *Brady* is consistent with innocence because the court would have determined that the withheld evidence would have resulted in acquittal, thus restoring our legal system's most sacred principle of innocent until proven guilty.

7. **Claim: If H.B. 411 becomes law, more claimants will attempt to prove a Brady violation was associated with their convictions. The state is ill-equipped to prove that a piece of information was, in fact, given to the defense decades ago. In many of these cases, the original defense attorney's files (where evidence about the prosecution's disclosures might be located) often mysteriously disappear. Economics professors will often say, "when you incentivize something, you'll get more of it." This bill incentivizes convicts to claim they were imprisoned because of a Brady violation. Not only could they be released, but they could get paid!**

Response: For a conviction to be vacated, dismissed or reversed on appeal because of a *Brady* violation, as H.B. 411 would require, the burden is on the defendant to learn of exculpatory and material evidence that was withheld by the prosecution and prove that such evidence is so powerful he or she would not have been convicted had it been disclosed. This is extremely difficult burden, which is why only one person was able to obtain compensation based on a *Brady* violation the time that the errors in procedure provision took effect in 2003 until the *Mansaray* decision in 2014.

Mr. Gutkoski's suggests a scenario that defies logic: that a defendant would receive powerful and exonerating evidence from the prosecutor at trial, intentionally not introduce it as part of his defense, be convicted, and then years later attempt to overturn the conviction by alleging he never received the information.