



Michael J. O'Neill

*Bill Analysis*  
Legislative Service Commission

## **H.B. 387**

123rd General Assembly  
(As Introduced)

**Rep. Logan**

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### **BILL SUMMARY**

- Requires the Summit County Court of Common Pleas or a jury to determine whether Terry Achberger is a "wrongfully imprisoned individual" for the purposes of obtaining compensation under the Wrongfully Imprisoned Individual Law.

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### **CONTENT AND OPERATION**

#### **Overview**

The Wrongfully Imprisoned Individual Law (secs. 2305.02 and 2743.48) provides that when a court of common pleas determines that an individual is a "wrongfully imprisoned individual," the individual has and may file a civil action against Ohio in the Court of Claims to recover a sum of money because of the wrongful imprisonment. Terry Achberger was imprisoned, subsequently was granted a new trial, and, after the prosecuting attorney filed a *nolle prosequi* dismissing the charges against him, was released from that imprisonment, but has not been able to obtain a judicial determination of whether he was a "wrongfully imprisoned individual." The bill would require the Summit County Court of Common Pleas or a jury to make such a determination.

#### **Stated facts of Terry Achberger's case**

The bill states that, on the evening of August 22, 1975, Officer Gary Yost, a Detective Sergeant in the Narcotic Division of the Akron Police Department, left his home for work as a part-time security guard at Shippers Dispatch Company. After Officer Yost had not returned home from the part-time security work at the usual hour, Mrs. Yost requested law enforcement agency assistance in finding her husband. Officer Yost's body was discovered the next day.

Local and state law enforcement agencies immediately began an investigation of Officer Yost's death. Following that investigation, in early 1976,

the Summit County grand jury returned indictments charging Terry E. Achberger, Danie Lee Teter, Donald Webb, Wilford Hyde, and Marion Sperrow with aggravated robbery and aggravated murder. In May 1976, the Summit County Court of Common Pleas granted the defendants' joint motion to dismiss those charges due to irregularities in the grand jury proceedings. Further grand jury consideration resulted in the return of new indictments against the defendants for the same offenses.

The cases against Wilford Hyde and Marion Sperrow were severed for separate trials, and they were found not guilty of the charges against them. Donald Webb entered into a plea bargain agreement with the State of Ohio, and, "in return for his testimony, Webb was allowed to enter a plea of guilty to a lesser crime." He was permitted to plead guilty to murder and aggravated robbery, was sentenced accordingly, and was the only alleged offender "to admit his part in the events leading to and encompassing the death of" Officer Yost. *State v. Teter* (September 8, 1977), Slip Opinion of the Ninth Appellate District (Summit County), C.A. No. 8301.

Terry Achberger and Danie Lee Teter were tried jointly and, on July 28, 1976, were convicted of aggravated murder and aggravated robbery. Pursuant to his plea bargain, Donald Webb testified at great length in the trial as to his association with Achberger and Teter. They subsequently were sentenced to life imprisonment on the aggravated murder charge and to a consecutive sentence of seven to 25 years imprisonment on the aggravated robbery charge. Court of Common Pleas of Summit County Case No. 76-4-436; *State v. Teter* (September 8, 1977), Slip Opinion of the Ninth Appellate District (Summit County), C.A. No. 8301.

Terry Achberger appealed his conviction to the Ninth District Court of Appeals, which affirmed the judgment of the Summit County Court of Common Pleas on September 8, 1977. The Ohio Supreme Court dismissed his further appeal on its own motion for want of a substantial constitutional issue on January 15, 1978. *State v. Achberger* (September 8, 1977), Slip Opinion of the Ninth Appellate District (Summit County), C.A. No. 8282.

On January 17, 1977, while Terry Achberger's appeal was pending before the Ninth District Court of Appeals, Donald Webb recanted his previous testimony and pleas in an oral sworn statement to Terry Achberger's counsel and stated that neither he nor Terry Achberger "had any involvement in the crimes charged." Terry Achberger then filed with the Summit County Court of Common Pleas on February 22, 1977, a motion for a new trial based on newly discovered evidence. On April 13, 1977, the trial court denied that motion, and the Ninth District Court of Appeals affirmed that decision on May 17, 1978. The appellate court stated

that "[t]he mere recantation by the State's principal witness of his trial testimony does not automatically, as a matter of law, entitle defendant to a new trial, nor does it automatically invoke the "due process clause" of the United States Constitution . . . . Here the trial court was presented with Webb's self-serving statement declaring himself and defendant to be blameless of any guilt. The motion for a new trial rested on recantation testimony, unsupported by other credible evidence of probative value . . . ." *State v. Achberger* (May 17, 1978), Slip Opinion of the Ninth Appellate District (Summit County), C.A. No. 8685.

Terry Achberger was imprisoned in the Ohio Penitentiary pursuant to the sentence imposed by the Summit County Court of Common Pleas. During that period of imprisonment, a Cleveland television reporter investigated the circumstances surrounding the aggravated murder of Officer Yost and concluded that another individual was responsible for the murder of Officer Yost, not the imprisoned Danie Lee Teter or Terry Achberger. The other individual never was convicted of the aggravated murder of Officer Yost because of the other individual's death due to an accidental overdose.

However, apparently based on the newly discovered evidence, Terry Achberger subsequently was granted a new trial in the Summit County Court of Common Pleas, and, prior to that trial, the Summit County Prosecuting Attorney filed a *nolle prosequi* dismissing the aggravated murder and aggravated robbery indictment against Terry Achberger.<sup>1</sup> Consequently, after years of imprisonment in the Ohio Penitentiary, Terry Achberger was released from imprisonment for offenses that he had not committed. (Section 1 of the bill.)

### **General Assembly findings**

The bill states that the General Assembly finds that Terry E. Achberger, because of the circumstances involved in his case, has been unable to obtain a determination in the Summit County Court of Common Pleas under the Wrongfully Imprisoned Individual Law that he did not commit the aggravated murder and aggravated robbery offenses of which he was erroneously convicted. The General Assembly further finds that, as a result of his inability to obtain this determination from the Court of Common Pleas of Summit County, Mr. Achberger is unable to recover an award of compensation for the losses, injuries, and damage he suffered while imprisoned in the Ohio Penitentiary.

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<sup>1</sup> "Nolle prosequi" is a formal entry upon the record . . . by the prosecuting officer in a criminal action, by which he declares that he "will no further prosecute" the case, either as to some of the defendants, or altogether. Black's Law Dictionary, Fifth Edition (1979).

The bill states that the General Assembly recognizes that generally no common law cause of action exists in Ohio against the state for an erroneous imprisonment of an individual and for errors of law committed by judges in the course of judicial proceedings. *Johns v. State* (1981), 67 Ohio St.2d 325, and *Tymcio v. State* (1977), 52 Ohio App.2d 298. The General Assembly further recognizes that, although it has enacted a procedure for a statutorily defined "wrongfully imprisoned individual" to obtain in the Court of Claims an award of compensation for the wrongful imprisonment, certain wrongfully incarcerated individuals may not be able to obtain a court determination that they are wrongfully imprisoned individuals and consequently are unable to secure an award of compensation pursuant to the statutory procedure. The General Assembly finds that Terry Achberger is an individual of that nature.

Although Terry Achberger appears to satisfy the eligibility criteria of a "wrongfully imprisoned individual" of (1) having been charged with aggravated felony or felony violations of the Revised Code by an indictment returned prior to September 24, 1986, (2) of having been found guilty of and not having pleaded guilty to the charges of aggravated murder and aggravated robbery involved, (3) of having been sentenced to imprisonment and served a period of imprisonment in a state correctional institution for the aggravated murder and aggravated robbery convictions, and (4) of having the aggravated murder and aggravated robbery convictions subsequently vacated or dismissed, the General Assembly finds that, through no fault on his part, Terry Achberger has been unable to obtain an award of compensation in the Court of Claims because he has been unable to obtain a determination in the Summit County Court of Common Pleas under the Wrongfully Imprisoned Individual Law that he did not commit the aggravated murder and aggravated robbery offenses of which he was erroneously convicted. (Section 2 of the bill.)

### **Operative provisions**

Notwithstanding the Wrongfully Imprisoned Individual Law and any contrary provision of the Court of Claims Laws, the bill provides that Terry Achberger may commence an action in the Summit County Court of Common Pleas. The action must request that court determine whether Terry Achberger is a wrongfully imprisoned individual with respect to the offenses he was convicted of on July 28, 1976. Terry Achberger must commence the action not later than one year after the bill's effective date by filing, pursuant to the Civil Rules, a complaint requesting the court to find that Terry Achberger is a wrongfully imprisoned individual with respect to the offenses he was convicted of on July 28, 1976. Upon the filing of the complaint, the court must schedule a hearing or other proceeding to make that determination under the Wrongfully Imprisoned Individual Law and otherwise comply with that Law.

Terry Achberger has the right to have counsel of his own choice in the action but is not entitled to have counsel appointed for him in connection with that action. Terry Achberger must prove his innocence by a preponderance of the evidence.

If the Summit County Court of Common Pleas determines that the offenses of which Terry Achberger was found guilty on July 28, 1976, including all lesser-included offenses, were not committed by him, then Terry Achberger meets the definition of a wrongfully imprisoned individual. In order for Terry Achberger to be eligible for an award of compensation under the Wrongfully Imprisoned Individual Law, Terry Achberger must commence an action in the Court of Claims no later than two years after the date the Summit County Court of Common Pleas enters the determination that he is a wrongfully imprisoned individual. (Section 3 of the bill.)

### **Existing Wrongfully Imprisoned Individual Law**

#### **The right to the action**

The existing Wrongfully Imprisoned Individual Law provides that a "wrongfully imprisoned individual" has and may file a civil action against Ohio in the Court of Claims to recover a sum of money because of the wrongful imprisonment (sec. 2743.48(C)(1)--not in the bill).

#### **"Wrongfully imprisoned individual" defined**

A "wrongfully imprisoned individual" is an individual who satisfies each of the following (sec. 2743.48(A)--not in the bill):

(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information and the violation charged was an aggravated felony or felony.

(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense, and the offense of which the individual was found guilty was an aggravated felony or felony.

(3) The individual was sentenced to a term of imprisonment in a state correctional institution for the offense.

(4) The individual's conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law,

village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(5) Subsequent to the individual's sentencing and during or subsequent to the individual's imprisonment, it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

### **Procedure**

A court of common pleas has exclusive, original jurisdiction to hear and determine an action or proceeding that alleging that an individual is a wrongfully imprisoned individual. When a court of common pleas determines that a person is a wrongfully imprisoned individual, the court must provide the individual with a copy of the Wrongfully Imprisoned Individual Law and orally inform the individual and the individual's attorney of the individual's rights under that Law to commence a civil action against Ohio in the Court of Claims because of the wrongful imprisonment and to be represented in that civil action by counsel of the individual's own choice. Within seven days after the date of the entry of the determination, the court must notify the clerk of the Court of Claims, in writing, of the individual's name and proposed mailing address and of the fact that the individual has the right to commence a civil action and to have legal representation.

If the wrongfully imprisoned individual does not commence such a civil action within six months after the entry of that determination, the clerk of the Court of Claims must send the individual a letter that reminds the individual of the individual's rights to commence an action. The clerk must send the individual a similar letter at least once each three months after the sending of the first reminder until either the individual commences the civil action or the statute of limitations for commencing the action expires.<sup>2</sup>

The Court of Claims has exclusive, original jurisdiction over the civil action. The civil action must proceed, be heard, and be determined as provided in the general Court of Claims Laws, except that if a provision of the Wrongfully Imprisoned Individual Law conflicts with a provision in the general Court of

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<sup>2</sup> *The statute of limitations for recovering under the Wrongfully Imprisoned Individual Law provides that the wrongfully imprisoned individual must commence the civil action in the Court of Claims no later than two years after the date of the entry of the determination of a court of common pleas that the individual is a wrongfully imprisoned individual (sec. 2743.48(H)--not in the bill).*

Claims Law, the Wrongfully Imprisoned Individual Law provision controls. In the civil action, the wrongfully imprisoned individual has the right to have counsel of the individual's own choice.

In the civil action, the individual may establish that the individual is a wrongfully imprisoned individual by submitting to the Court of Claims a certified copy of the judgment entry of the court of common pleas associated with the individual's conviction and sentencing, and a certified copy of the entry of the determination of a court of common pleas that the individual is a wrongfully imprisoned individual. No other evidence is required of the individual to establish that the individual is a wrongfully imprisoned individual, and the individual is irrebuttably presumed to be a wrongfully imprisoned individual. (Secs. 2305.02 and 2743.48(B), (C), (D), and (E)(1)--not in the bill.)

### **Award**

Upon presentation of requisite proof to the Court of Claims, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts (sec. 2743.48(E)(2)--not in the bill):

(1) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining the individual's discharge from confinement in the state correctional institution;

(2) For each full year that the individual was imprisoned in the state correctional institution for the offense of which the individual was found guilty, \$25,000, and for each part of a year that the individual was so imprisoned, a pro-rated share of \$25,000;

(3) Any loss of wages, salary, or other earned income that directly resulted from the individual's arrest, prosecution, conviction, and wrongful imprisonment.

If the Court of Claims determines that the complainant is a wrongfully imprisoned individual, it must enter judgment for the wrongfully imprisoned individual in the amount of the sum of money to which the individual is entitled, as described above.<sup>3</sup> If the wrongfully imprisoned individual was represented in

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<sup>3</sup> *In determining that sum, the Court of Claims must not take into consideration any expenses incurred by Ohio or any of its political subdivisions in connection with the arrest, prosecution, and imprisonment of the wrongfully imprisoned individual, including, but not limited to, expenses for food, clothing, shelter, and medical services (sec. 2743.48(F)(1)--not in the bill).*

the civil action by counsel of the individual's own choice, the Court also must include in the judgment entry an award for the reasonable attorney's fees of that counsel. (Sec. 2743.48(F)(1) and (2)--not in the bill.)

**Scope of state liability**

Under the Wrongfully Imprisoned Individual Law, the state consents to be sued by a wrongfully imprisoned individual because the individual's imprisonment was wrongful, and to liability on its part because of that fact, only as provided in the Wrongfully Imprisoned Individual Law. But, that Law does not affect any liability of Ohio or of its employees to the individual on a claim for relief that is not based on the fact of the individual's wrongful imprisonment, including, but not limited to, a claim for relief that arises out of circumstances occurring during the individual's confinement in the state correctional institution. In addition, to be eligible to recover a sum of money because of the individual's wrongful imprisonment, the individual must not have been, prior to September 24, 1986, the subject of an act of the General Assembly that authorized an award of compensation for the individual's wrongful imprisonment or have been the subject of an action before the former Sundry Claims Board that resulted in an award of compensation for the individual's wrongful imprisonment. (Sec. 2743.48(F)(3) and (H)--not in the bill.)

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**HISTORY**

ACTION	DATE	JOURNAL ENTRY
Introduced	06-15-99	p. 836

H0387-I.123/jc