

# COMPENSATION UNDER THE MICROSCOPE:

WISCONSIN [updated July, 2023]

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## Introduction

Wisconsin has one of the nation's oldest wrongful conviction compensation statutes, dating to 1913. It also rivals New Hampshire for offering exonerees the least compensation. The Wisconsin Claims Board can award eligible exonerees no more than \$25,000 in total at a rate of no more than \$5,000 per year incarcerated.

Within the Wisconsin statute lies a small and seldom-used door to more appropriate awards. The Wisconsin Court of Appeals in June, 2022 issued a divided opinion that may have cracked that door open just a bit wider. But, on June 30, 2023, a sharply divided Wisconsin Supreme Court closed that door. This report examines the Wisconsin statute and the case, brought by [Derrick Sanders](#), that led to a disappointing outcome for certain claimants.

## The Statute

The Wisconsin statute, as amended in 1979, is short and relatively simple. It assigns to the Wisconsin Claims Board the authority to hear petitions of those imprisoned for “the relief of innocent persons who have been convicted of a crime.” Wis. Stat. § 775.05(1). Once a petition is filed, the Claims Board provides a copy of the petition to the prosecutor and to the judge who presided over the criminal trial, or their successors. *Id.*, § 775.05(2). There is no apparent requirement that they respond in any way; the petition is “for the information of these persons.” *Id.*

The Claims Board then hears evidence and determines whether the petitioner showed they were innocent by clear and convincing evidence. *Id.*, § 775.05(3). If the Claims Board finds the petitioner is innocent and “did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation,” then it will grant the claim. *Id.*, § 775.05(4).

The next part of the statute was at issue in the *Sanders* case. If the petition is granted:

*the claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment. . . . If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2).*

*Id.*

The language of the statute raises factual and interpretive questions. The highlighted provision of the statute is not entirely clear. It appears to impose a duty on the Claims Board to determine what amount will equitably compensate the claimant. If the Board concludes \$25,000 at a rate not greater than \$5,000 per year is not adequate compensation, then it must submit a report to the legislature. If no such report is submitted, it can be presumed that the amount selected, within the \$25,000 total/\$5,000 per year metric, was regarded as equitable. If, perhaps, the claimant was wrongly incarcerated for a brief period, that conclusion might be justifiable. But, for those imprisoned for a longer period, shouldn't the Claims Board almost<sup>1</sup> always find it to be inadequate? In such longer imprisonment cases where the claimant argues that the statutory metric is inadequate and the Board does not submit a report, how can a reviewing court evaluate the Board's implied conclusion that very modest compensation was adequate?

### Wisconsin By the Numbers

As of July 2023, the National Registry of Exonerations had recorded 66 Wisconsin exonerees wrongly convicted in Wisconsin state courts since 1989. Five were not imprisoned as a result of their wrongful convictions, leaving 61 potentially eligible persons for state compensation listed in the Registry.<sup>2</sup> The two-page application form is on the Board of Claim's website: [State of Wisconsin Claims Board Claim Form](#). The application permits the petitioner to make a statement as to why additional compensation should be provided by the legislature.

Of those 61 exonerees, just 24 had filed claims by July 2023. Wisconsin's filing rate of 39% is significantly below the national average of 58%. Wisconsin's low compensation is a logical explanation.

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<sup>1</sup> Forest Shomberg was exonerated of a sexual assault and was incarcerated for over six and a half years. His request for state compensation was denied, but later reversed. On remand before the Board, Shomberg's estate argued that it was entitled to equitable compensation. The Board rejected the argument, concluding that \$20,000 was justified on the basis of his actions after his release and before his death. The decision does not specify those actions, but press reporting indicated that Shomberg suffered from drug problems, thoughts of suicide and was arrested on a gun charge, apparently in connection with a possible suicide attempt. The notion that the Claims Board can account for post-exoneration behavior in determining an equitable amount of compensation for wrongful imprisonment is problematic and raises the question as to whether the petitioner must present evidence of post-exoneration "clean hands."

<sup>2</sup> One of those five, David Turnpaugh, was later found to have been imprisoned for three days and was awarded \$822.

Of the 24 filers, 16<sup>3</sup> were granted compensation and eight<sup>4</sup> were denied. Each of those eight were denied on the ground that they had not demonstrated their innocence by clear and convincing evidence. None of those decisions appear to have been appealed.

The following chart provides a comparison of compensation in Wisconsin to three other states with similar numbers of compensated exonerees. The third column shows the total amount the state has paid to exonerees in the Registry. The fourth column shows the average amount paid per year of wrongful incarceration in those states.

State	# of Exonerees Paid	Total Amount Paid by State	Average Amount of Compensation Paid per Year of Incarceration
Wisconsin	16	\$445,416	\$2,632
Mississippi	17	\$5,873,840	\$26,785
Maryland	17	\$33,281,501	\$83,107
Connecticut	13	\$50,644,270	\$280,422

The monetary value of an exoneree’s years lost to wrongful incarceration is worth 106.5 times more in Connecticut than in Wisconsin. The widely different compensatory metrics among the states is stunning. An exoneree’s statutory compensation turns largely on the fortuity of the state in which they were wrongly convicted.

Of the 16 Wisconsin exonerees awarded compensation, only one, Robert Lee Stinson, appears to have been provided additional compensation from the Wisconsin legislature following a Claims Board recommendation. In 2014, four years after the Claims Board approved a \$25,000 award, the legislature awarded him an additional \$90,000, giving him a total of \$115,000 for 23.1 years lost. According to the Claims Board decision in the case, Stinson simply requested \$5,000 for each of the 18 years he spent in prison beyond the five years for which he was initially compensated.<sup>5</sup>

The Claims Board also recommended in March 2022 that Daryl Holloway, who was wrongly incarcerated for 23.2 years, be granted an additional \$975,000, the amount of supplemental compensation he had requested, which would bring his total compensation to \$1 million. As of June 2023, the legislature had not acted on that recommendation.

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<sup>3</sup> One of those awarded compensation was Steven Avery, the subject of the “Making a Murderer” series on Netflix. In his 2004 case, he requested compensation beyond the \$25,000 cap. The Claims Board addressed the request and rejected it on the grounds that a legislative committee at that time was considering “a range of issues concerning innocent convicts.”

<sup>4</sup> Jarrett Adams, Peter Ambler, Maurice Corbine, Raynard Jackson, Cornelius Reed, Mario Vasquez, Vonaire Washington and Michael Winston.

<sup>5</sup> The Stinson case offers a clear example of the wide gulf between negotiated settlements in civil rights cases and what states award as compensation. In 2019, Stinson settled his federal civil rights case against the City of Milwaukee for a reported \$7,500,000.

## The Sanders Case

Derrick Sanders pled no contest to a charge of intentional homicide, party to a crime, following a shooting death in 1992. He was sentenced to life in prison. Sanders admitted that he had beaten the victim prior to the shooting, but claimed he was not present when the victim was fatally shot. In 2018, a Wisconsin state court judge permitted Sanders to withdraw his guilty plea on the ground that his lawyer did not adequately explain that participation in a beating of a victim later shot to death by others did not constitute the more serious crime to which he had pled guilty. The court further found that the facts underlying his guilty plea did not constitute the crime for which he had been convicted. That conviction was set aside and Sanders was released after prosecutors declined to retry him.

In 2019, Sanders filed a claim with the Claims Board seeking \$25,000 plus nearly \$6 million in additional damages. *Sanders v. State Claims Bd.*, No. 2021AP373, 2022 Wisc. LEXIS 164, at \*2 (Wis. June 30, 2023). Unlike Stinson, he asked for far more than just \$5,000 for each year of his wrongful incarceration.

Following a December 2019 hearing at which the District Attorney's Office declined to appear, the Claims Board found Sanders eligible for compensation and awarded him \$25,000. *Id.* It did not address his claim for additional damages. *Id.* at \*7-8.<sup>6</sup> Sanders filed a petition for a rehearing challenging that failure. *Id.* The Claims Board denied the rehearing petition. *Id.* Sanders's appeal to a Wisconsin circuit judge was unsuccessful; he then appealed to the Wisconsin Court of Appeals. *Id.*

Sanders' principal argument was that the Claims Board erred in failing to address his claim that the Board recommend the award of additional damages to the legislature as it had in the Stinson and Holloway cases. The Claims Board's position was that it was not required to address Sanders's claim because it had not determined that the \$25,000 maximum award was inadequate.

In a 2-1 decision, the Court of Appeals majority sided with Sanders, holding that "Wis. Stat. § 775.05(4), read as a whole, requires that the Claims Board, when it awards the statutory maximum amount, explain its discretionary determination that the statutory maximum amount either does or does not constitute adequate compensation." *Derrick<sup>7</sup> v. State Claims Bd.*, 2022 Wisc. App. LEXIS 501, at \*4 (Wis. Ct. App. Jun 9, 2022). The State appealed to the Wisconsin Supreme Court.

In its 4-3 decision on June 30, 2023, the Supreme Court reversed the Court of Appeals. The Court held that by not presenting a report to the legislature and by awarding Mr. Sanders \$25,000 in compensation for his 25 years of wrongful incarceration, the Claims Board determined that the amount awarded was adequate compensation. Mr. Sanders' argument was

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<sup>6</sup> A review of prior Claims Board decisions shows that the Board similarly did not respond to requests for additional compensation filed by Rommain Isham and Maxwell Verkuilen.

<sup>7</sup> The case is mis-titled in the LEXIS version of the case report.

based on incredulity: how can a rational decision-maker possibly determine that \$1,000 per year of incarceration is adequate compensation for a wrongful conviction? That, he essentially argued, warrants an explanation. So does the Wisconsin statute.

Section 775.05(5) provides that “[t]he findings and the award of the claims board shall be subject to review.” The Claims Board does not have unreviewable discretion to set any award it chooses. It is subject to judicial review and a court could conclude that the decision was arbitrary and capricious or unsupported by substantial evidence. Mr. Sanders argued that, for such review to happen, the reviewing court must have some explanation for its decision. Here, he asserted, the inexplicable decision was entirely unexplained.

The majority rejected that argument. Resting on a strict reading of the statutory language, the majority held that findings are required only when the Board concludes that the statutory caps are inadequate. In contrast, the statute permits, but “does not command the Board to make a finding regarding the adequacy of \$25,000.” *Sanders*, 2023 Wisc. LEXIS 164 at \*9.

With respect to Section 775.05(5), the majority held that reviewable “findings” are findings of fact, not the sort of conclusions or determinations made by the Claims Board. *Id.* at \*17. Nor is a decision not to make findings itself a finding. Thus, with respect to \$25,000’s adequacy, the Board made no findings, and was not required to do so. Why the Claims Board’s unexplained decision to award Mr. Sanders \$25,000 is not an “award” subject to judicial review under Section 775.05(5) is not fully explained by the majority. But the bottom line is clear. The Claim Board’s decision to award Mr. Sanders \$25,000 and its unexplained conclusion that it was adequate compensation is not reviewable.

The Court did not address a different issue. What if the Claims Board did what was not required of it and explained the reason for its decision? What if the Claims Board justified its decision on the ground that Mr. Sanders was involved in the assault, but not the murder, of the victim and thus did not deserve an enhanced award? In such a case, there would be findings that a court could consider on appeal, but the statute provides no guidance on how the Claims Board should determine whether compensation is “equitable.”

Without such statutory standards, would a reviewing court nevertheless decide whether the Board’s rationale was reasonable, or would it decide that the absence of statutory standards reflects the legislature’s determination to vest the Claims Board with unreviewable discretion to decide what “equitable” means? If the latter, a victory for Mr. Sanders before the Supreme Court might not lead to a Board report to the legislature recommending enhanced compensation. A victory would have required the Claims Board to explain its decision and, if it adhered to the view that \$25,000 was equitable, such a decision might nevertheless be unreviewable, or, if reviewable, under a very deferential standard.

Drawing from reporting on the National Registry of Exonerations, the dissent observed that Wisconsin trails virtually all other states in its compensation metric. *Sanders*, 2023 Wisc. LEXIS 164 at 32. With respect to the statute, the dissent reasoned that it required the Claims Board to first determine what was an adequate compensatory amount. If that amount fell within the statute’s compensatory metric, the Board would conclude the resulting award was adequate

and need not submit a report to the legislature. In contrast, if the statutory limits were inadequately compensatory, such a report was required. *Id.* at \*37.

According to the dissent, the former decision – that \$25,000 or less is adequate – is one the Claims Board has discretion to make, but that discretionary decision requires an explanation. That explanation is ordinarily reviewable. But, because the Board failed to explain its rationale, the reviewing courts have no basis for determining whether the Board’s discretion was exercised in a manner that was not arbitrary and was supported by substantial evidence. *Id.* at \*46-48.

### The Upshot of *Sanders*

The *Sanders* Court interprets the Wisconsin statute to give the Claims Board unreviewable authority to conclude that \$25,000 (or less) is adequate compensation for a person it determined was innocent of a crime that resulted in decades of wrongful incarceration. The impact of the decision is compounded by the reality of Wisconsin’s low compensatory metric. It leaves exonerees like Derrick Sanders with very little and nothing to do about it.

The Wisconsin legislature could pass a private bill awarding Sanders and others more compensation. But that seems highly unlikely. Unlike a state like Virginia, Wisconsin does not have a history or culture of bipartisan support for legislatively mandated compensation awards. If Wisconsin has not responded to the Claims Board’s report supporting additional compensation for Daryl Holloway, it is not likely to compensate Derrick Sanders without one.

The Wisconsin legislature could pass a statute that simply increases the compensatory metric. Efforts to do that have not been successful. Wisconsin could do nothing and count on exonerees to file federal civil rights cases that, if successful, would compensate them adequately. However, of 66 Wisconsin exonerees, only 11 have filed civil rights cases and, of those, only six have resulted in compensation. Wisconsin ranks quite low nationally in the percentage of civil rights cases filed, and with recoveries for the plaintiff.

Or, Wisconsin could tweak the statute to require the Claims Board to make reviewable findings in cases in which it determines the compensation it awarded is adequate. An amended statute might look like this, with the italicized language being added and the struck-out language deleted:

(4) If the claims board finds that the petitioner was innocent and that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the claims board shall find the amount which will equitably compensate the petitioner[.] ~~not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment.~~ Compensation awarded by the claims board shall include any amount to which the board finds the petitioner is entitled for attorney fees, costs and disbursements. ~~If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2).~~

*The claims board's findings regarding equitable compensation, fees, costs and disbursements shall be documented and explained in the records of its proceedings and shall be considered findings and awards subject to review pursuant to subsection (5).*

- (a) If the claims board finds the amount which will equitably compensate the petitioner does not exceed \$25,000 and \$5,000 per year of imprisonment, it shall award the petitioner that amount.*
- (b) If the claims board finds that the amount it has found is equitable exceeds \$25,000 or \$5,000 per year of imprisonment, and the petitioner has requested compensation exceeding those amounts, the claims board shall submit a report specifying the amount which it considers equitable and why it is equitable to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2).*

(5) The claims board shall keep a complete record of its proceedings in each case and of all the evidence. The findings and the award of the claims board *made in subsection (4)* shall be subject to review as provided in ch. 227.