

COMPENSATION UNDER THE MICROSCOPE:

WHAT HAS GONE WRONG WITH OREGON'S WRONGFUL COMPENSATION STATUTE?

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August, 2024

Introduction

Oregon's legislature passed one of the country's most recent wrongful conviction compensation statutes in 2022. Not surprisingly, it borrows statutory structure and language from existing statutes that follow a litigation model in which a plaintiff files a claim for compensation in court and a judge (or jury) decides the case. In the nearly two and half years since passage, only three Oregon exonerees, of 27 listed on the National Registry of Exonerations who are potentially eligible, have received compensation, and two of those were compensated by settlement before even filing a complaint.

The storyline of the Oregon statute is one of promise and disappointment.¹ The compensation bill was introduced by a Republican lawmaker, Rep. Kim Thatcher, after talking to her handyman, John Loveless, an exoneree. It passed and was signed into law quite quickly. But, since then, advocates for the exonerated have complained that the Oregon Attorney General's Office appears to be fighting most of these cases. This seems unfair to them because the plaintiffs have already obtained court orders setting aside their convictions. Rep. Thatcher was quoted saying, "That was not the intention. There was no intention to have to have a court battle."²

This article examines the Oregon statute. We see that there are none of the unusual barriers to compensation that are sometimes found in other state statutes. We show the numbers

¹ Jessica Schulberg, *Oregon Passed A Bill To Compensate The Wrongfully Convicted. Almost None Of Them Have Been Paid*, HUFFPOST (Dec. 20, 2023), https://www.huffpost.com/entry/oregon-wrongful-conviction-compensation-bill_n_6580ab28e4b08e9b410b898e; *Wrongfully convicted people in Oregon are not being paid despite new bill passed in 2022*, THE GRIO (Dec. 22, 2023), <https://thegrio.com/2023/12/22/wrongfully-convictions-oregon-senate-bill-1584>; See also Jim Redden, *Oregon fighting most wrongful conviction compensation filings*, Portland Tribune (May 25, 2024), https://www.portlandtribune.com/news/oregon-fighting-most-wrongful-conviction-compensation-filings/article_d4fe3d9a-1797-11ef-890e-5b9884b7f606.html.

² Jessica Schulberg, *Oregon Passed A Bill To Compensate The Wrongfully Convicted. Almost None Of Them Have Been Paid*, HUFFPOST (Dec. 20, 2023), https://www.huffpost.com/entry/oregon-wrongful-conviction-compensation-bill_n_6580ab28e4b08e9b410b898e.

of claims filed and what has happened to them. Ultimately, though, no one should be surprised about what is going on in Oregon. So long as statutes of this sort require plaintiffs or claimants to bear the burden of demonstrating their innocence of the crimes for which their convictions have been reversed or vacated, and the order vacating the conviction does not rest on a finding of innocence, the government can be expected to defend these cases vigorously.

The Oregon Statute

Oregon's 2022 wrongful conviction compensation statute took effect on March 23, 2022. ORS 30.657. It follows a judicial model, requiring a plaintiff to file suit against the state in state court. ORS 30.657(4)(a).

A plaintiff must prove by a preponderance of the evidence that: 1) they were convicted of one or more felonies and subsequently imprisoned; 2) the conviction was reversed or vacated and either the charges were dismissed or they were found not guilty after retrial, or they received a pardon from the Governor; 3) they did not commit the crime(s) for which they were convicted and were not an accessory, accomplice, or otherwise involved in the acts giving rise to the conviction; and 4) they did not commit perjury, fabricate evidence, or, by their own conduct, cause or bring about the conviction. ORS 30.657(1).

If a plaintiff prevails, they are entitled to \$65,000 per year of incarceration and \$25,000 per year of post-release supervision or listing on a sex offender registry. ORS 30.657(5). Starting in 2023, these amounts were adjusted for inflation. ORS 30.657(8). In addition, the statute requires the court to award a prevailing plaintiff reasonable attorney's fees, reimbursement for restitution, fees or other costs paid associated with the conviction, and may provide access to state, local or other service programs, such as counseling, housing assistance, medical assistance, educational assistance, job training, legal services to regain custody of children, and assistance with food and transportation and personal financial literacy. ORS 30.657(7).

If a plaintiff had, prior to the date of judgment, won or settled a civil case arising from the wrongful conviction, the amount received is subtracted from the state compensation award. ORS 30.657(9)(a). If a plaintiff later wins a civil action against a public body of Oregon, they must reimburse the state for the equivalent amount of compensation earlier paid to them. ORS 30.657(9)(b).

A suit must be filed within two years after the date of dismissal of the criminal charges against the plaintiff, finding of not guilty on retrial, or the grant of a pardon by the Governor. ORS 30.657(13). However, Oregon has a unique notice provision. ORS 30.659. Before filing suit, it requires prospective plaintiffs to first file a notice of claim with the Director of the Oregon Department of Administrative Services within 180 days of the dismissal of conviction, finding of not guilty after retrial, or award of a gubernatorial pardon. *Id.*

The Data

In response to a June 2024 Freedom of Information Act request, Oregon disclosed 43 notices of claims. For those worried that passing a new or amended state compensation statute

will result in a deluge of claims, many non-meritorious, Oregon's experience suggests that is not the case. Of those 43 claimants, according to the Oregon Department of Justice and additional research,³ 24 have filed lawsuits.⁴ One additional person appears to have filed a lawsuit without filing a claim. Two others, Christopher Boots and Eric Proctor, received state compensation after filing notices of claim and without filing suit.⁵

Of those 44 claimants, 21 were listed on the National Registry of Exonerations as of July 8, 2024. Arguably, those are the most likely to prevail on claims for compensation. Of the 21 claimants in the National Registry, 17 have filed lawsuits seeking compensation to date.

As of July 7, 2024, the National Registry listed 39 persons exonerated of crimes of which they were convicted in state courts in Oregon. Twelve were not incarcerated and are not eligible for state compensation. One of those twelve appears to have filed a notice of claim anyway.

To date, only three claimants have been compensated: Boots and Proctor and Frederick Bain. Three complaints, each filed *pro se*, were dismissed. None of those plaintiffs are listed in the Registry. That leaves 23 lawsuits that are unresolved.

The Problem

Is the Oregon Attorney General's Office fighting these cases? If fighting means not settling, the answer is yes, so far. The dockets in several of these cases, including those of Lisa Roberts and Frank Gable, whose cases are prominently mentioned in the press, reflect the substantial back and forth of litigation. In other cases, there appears to be significant passages of time without significant litigation activity, suggesting that little or slow progress toward resolution is being made. At the same time, many of the pending cases were filed quite recently, and it is too early to tell whether and how the state will respond.

It is not surprising that many of these cases are being actively defended by the Attorney General's Office. Settling cases requires assessing the risk of defeat. When there is a new statute, that assessment is hard to make. Judges have not made many rulings or judgments in these cases. It is understandable that both parties, but particularly the state, would want further clarity on the law before settling cases that are not clear winners for a plaintiff.

However, the more fundamental problem lies in the legal gap between why a plaintiff's conviction was set aside and what they have to prove to win compensation. To win compensation in Oregon, and virtually all other states, a plaintiff must prove their innocence by a preponderance or clear and convincing evidence. As a *Huffington Post* article points out,

³ The Oregon judiciary maintains an on-line system in which one can find dockets of cases filed in Oregon courts.

⁴ It is possible that some people who filed notices will still file lawsuits.

⁵ Proctor and Boots are the only two Oregon exonerees who have filed civil rights cases and have recovered compensation as a result.

however, very few convictions, if any, are set aside because the criminal defendant, in post-conviction proceedings, has convinced a judge, by the civil standard of proof, that they are innocent. See fn. 1, *supra*.

Generally, a state prisoner has one year after their judgment of conviction to file a federal habeas petition. Often, however, evidence of innocence comes to light after that deadline, and to not allow that evidence to be considered may result in a miscarriage of justice. Thus, the United States Supreme Court has established what it calls a “gateway,” an exception to the one-year deadline, but that exception is very demanding: “A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

This gateway is called the *Schlup* standard, after the case establishing it. *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Meeting it requires a showing that no reasonable juror would have found the petitioner guilty. That is different than showing that the petitioner is innocent. As a result, the state judge hearing Lisa Roberts’s compensation case held that satisfying the *Schlup* standard was not enough to warrant an award of compensation.

This sort of reasoning is not uncommon. States have various methods by which a person can seek to set aside their criminal convictions. Petitioners may seek a writ of habeas corpus, petition for relief of judgment, seek post-conviction relief, and there are other routes as well. Most of these require the movant to show that their trial was unfair because something violated their federal or state-based rights: their attorney provided inadequate legal assistance, the state failed to honor its *Brady* obligations, the court erroneously admitted inculpatory evidence or excluded exculpatory evidence, new evidence of innocence was found after the trial, and so on.

These are just examples, and the reality of post-conviction litigation is far more complex than has been described here. The bottom line is that while post-conviction litigation may feature evidence of possible innocence, prevailing does not necessarily require proof of it by a preponderance or clear and convincing evidence. That leads to a counter-intuitive conclusion that despite how lengthy, difficult and painstaking the battle for post-conviction relief can be, it is easier to get out of prison than to get paid for being in there.

Compensation statutes are founded on a fundamental worry – that possibly guilty people will get paid. Thus, proof of innocence is demanded. It is in this uncomfortable gap (I will call it the innocence gap) between obtaining criminal post-conviction relief and the demands of the civil compensation system where advocates find unfairness. The question for those creating fair compensation systems, then, is how to close that gap.

One way is the approach taken in a series of amendments to California’s compensation statute. The idea was to tie compensation to certain forms of post-conviction relief. If a plaintiff obtains post-conviction relief on Ground A, then they are automatically entitled to compensation; or, perhaps, presumptively entitled to compensation unless the government can demonstrate ineligibility for some reason. Ground A may or may not incorporate or depend upon a finding of innocence, memorialized, for example, by the issuance of a certificate of innocence. By

incorporating certain grounds of post-conviction relief into the compensation statute, a legislature is saying that form of relief is sufficiently probative of innocence that compensation should be awarded.

California Penal Code § 4900(a) permits those who were convicted of a felony and imprisoned as a result to file a claim for compensation against the state with the California Victim Compensation Board. They must demonstrate that they were either pardoned by the Governor on grounds of innocence or were innocent of the crime for which they were convicted. So far, there is nothing particularly unusual about the California statute.

The statute has been amended several times since it was initially enacted in 2013, and has become increasingly complex, but the legislature has added a gloss to Section 4900(a). Cal. Penal Code § 4902. Generally, if, as part of a habeas proceeding or when the court vacates a judgment under Section 1473.6 of the Penal Code, the judge finds the person factually innocent, by a preponderance of evidence, that finding is binding on the Compensation Board. Cal. Penal Code § 1485.55(a). Similarly, if a judge otherwise issues a determination of factual innocence, that too is binding on the Compensation Board. Cal. Penal Code § 851.865; see Cal. Penal Code § 4902(a).

These amendments make sense. Judicial determinations of innocence are binding on administrative decision-makers. Exonerees do not need to re-prove their innocence in these cases before the Board. Of relevance to our discussion of Oregon, California courts had wrestled with whether a court finding that a petitioner satisfied the *Schlup* gateway is a finding of factual innocence under Section 1485.55. At first, the Courts of Appeal were split on this question, *Larsen v. California Victim Comp. Bd.*, 64 Cal. App. 5th 112 (Cal. App. 2021) (yes); *Souliotes v. California Victim Comp. Bd.*, 61 Cal. App. 5th 73 (Cal. App. 2021) (no). After the California Supreme Court vacated the *Souliotes* decision, that court of appeal agreed with *Larsen*. *Souliotes*, 2022 Cal. App. Unpub. LEXIS 7918 (Cal. App. Dec. 28, 2022).

More significantly, California Penal Code § 4900(b), enacted in 2021, makes an exception to the general principle that the claimant must demonstrate their innocence by a preponderance of the evidence. It states that if “a state or federal court has granted a writ of habeas corpus or if a state court has granted a motion to vacate pursuant to Section 1473.6⁶ or

⁶ Section 1473.6 of the California Penal Code provides that “[a]ny person no longer unlawfully imprisoned or restrained may prosecute a motion to vacate a judgment for any of the following reasons: **(1)** Newly discovered evidence of fraud by a government official that completely undermines the prosecution’s case, is conclusive, and points unerringly to his or her innocence. **(2)** Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment. **(3)** Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief under this paragraph.

paragraph (2) of subdivision (a) of Section 1473.7,⁷ and the charges were subsequently dismissed, or the person was acquitted of the charges on a retrial, the California Victim Compensation Board shall, upon application by the person, and without a hearing, approve payment to the claimant . . . unless the Attorney General establishes pursuant to subdivision (d) of Section 4902, that the claimant is not entitled to compensation.”⁸

These grounds of post-conviction relief, set out in the footnotes below, do not require findings of innocence by a preponderance of evidence. In a case in which a compensation claim was denied before the statutory amendment, but granted after it, the Board explained, “CalVCB’s approval of the claim is statutorily required, regardless of whether or not the record proves the claimant is more likely innocent than guilty.”⁹ However, these grounds of post-conviction relief are narrow: they can only be used by persons who have been released from custody, not those who remain in custody. Incarcerated persons would, presumably, seek habeas relief.

Have these legislative enactments in California made any difference? They may have. At the end of 2021, of the California exonerees then listed in the Registry, 36% filed claims, 62% were awarded and 36% of the lost years were compensated under the state compensation statute. As of July 2024, 41% have filed, 71% have been awarded and 48% of the lost years have been compensated. During that period, no claims filed by people in the Registry were denied. Prior to the statutory amendments, the Board issued a significant number of denials.

Conclusion

These California amendments appear both to have closed to some degree the “innocence gap” and to have sped the award of compensation to those entitled to it. They serve as potential models for reform of compensation in other states, including, of course, Oregon, its neighbor to the north. There is unlikely to be a uniform way of doing this because state post-conviction remedies differ from state to state. However, these dual concepts show promise: 1) to make judicial findings of innocence in post-conviction relief proceedings binding on compensation decisionmakers; and 2) to make certain forms of post-conviction remedies result in automatic compensation unless the government can demonstrate a reason, grounded in the statute, why a claimant or plaintiff is not entitled to it.

⁷ California Penal Code § 1473.7(a)(2) provides that: “A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for any of the following reasons: (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.”

⁸ The showing by the Attorney General must be made by clear and convincing evidence. Cal. Penal Code § 4902(d).

⁹ *In the Matter of Maurice Caldwell*, 13-ECO-01 at 22 (Crime Victim Compensation Board of the State of California, Feb. 14, 2024).