

COMPENSATION UNDER THE MICROSCOPE:

PARDONS AND COMPENSATION

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Introduction

A governor's pardon power is a potentially double-edged sword. On the one hand, a governor can provide justice for a deserving criminal defendant when the judicial branch cannot or does not act. On the other hand, the governor can use the pardon power for less altruistic purposes, such as to benefit friends or political allies.

The most recent controversial use of the pardon power occurred in Kentucky. According to the *Louisville Courier-Journal*, Governor Matt Bevin of Kentucky issued 670 pardons and commutations during his last two months of office, including 254 pardons issued in the month between his re-election defeat in November 2019 and his departure. Bevin was praised by some for addressing over-incarceration in Kentucky but also was criticized for many of his pardons, including that of a man convicted of murder whose brother had hosted a Bevin political fundraiser. In 2022, a bill limiting the governor's pardon power was introduced in the Kentucky General Assembly. The State Senate passed the bill, but it did not pass the State House of Representatives.

While we commonly think of orders vacating convictions and exonerating criminal defendants as being the work of courts, the National Registry of Exonerations has recorded 194 exonerees who were pardoned as of September 2022. Not all of these pardons were issued by governors alone. Indeed, as described in the Restoration of Rights [website](#), states have adopted several different methods for issuing pardons. In six states, an independent board issues the pardon.¹ In 22 states, the governor shares pardon power with a state board.² In 19 states, including Kentucky, the governor may, but is not required to, consult with a board prior to issuing a pardon.³

Receiving a pardon alone is not enough for someone to be added to the Registry. Instead, the Registry regards a person as being exonerated by pardon if he or she was convicted of a crime and, after a post-conviction reexamination of the evidence in the case, they 1) receive a complete pardon by a governor or other competent state authority, whether or not the pardon

¹ Two of those states, Alabama and Connecticut, account for just two of the 194 pardons.

² Seventy-four of the pardons were issued in these states, which include Texas. Sixty-one of the 194 pardons were issued in Texas.

³ In three states, there is a statute governing the process by which a governor may or must consult with another state entity before issuing a pardon. None of the pardons discussed here were issued in these states.

states that it is based on the person's innocence, *and* 2) the person received the pardon after evidence of innocence became available that was either not presented at the trial at which the person was convicted or, if the person pled guilty, was not known to the defendant or their attorney at the time of the plea..

Of Governor Bevin's hundreds of pardons, the Registry determined that only six met its definition of "exoneration."⁴ The 194 recorded pardons for exonerees listed in the Registry came from just 21 states, including Kentucky. Most of those pardons were granted in only four states: Illinois (45), North Carolina (22), Texas (61)⁵, and Virginia (30).

Receipt of a pardon does not guarantee compensation, but as we shall see, the frequency of compensation is higher for pardoned exonerees than for those without pardons.

What Do Pardons Have to Do With Compensation?

Civil Rights Cases

Gubernatorial pardons in particular are relevant to efforts to obtain both state statutory compensation and civil compensation. Almost all lawsuits filed seeking civil compensation for wrongful conviction are federal civil rights cases filed pursuant to 42 U.S.C. § 1983.

Conceptually, these cases raise an important question – when is it too early to file suit? Can someone who has been convicted in a state court of a crime, but whose conviction has not been set aside, file a Section 1983 case for alleged violations of their civil rights? If not, what action must the state court or other state entity do to trigger that right to sue?

The Supreme Court addressed this question in *Heck v. Humphrey*, 512 U.S. 477 (1994). Heck was convicted of the voluntary manslaughter of his wife in an Indiana state court. While he was appealing that conviction, he filed a federal Section 1983 case against county prosecutors and a police investigator alleging, among other things, that they had destroyed exculpatory evidence. At the time he filed the case, his conviction stood. The defendants moved to dismiss the case.

Noting that Section 1983 cases create a form of tort liability, the Court analogized Heck's federal civil rights claim to a state tort claim for malicious prosecution. To win such a case, the plaintiff must show that the criminal case ended in his or her favor. Without such a requirement, a malicious prosecution case plaintiff would have to challenge their criminal prosecution in the context of their civil case. That would be contrary to long-standing doctrine that prevents people from challenging (the term here is "collaterally attacking") their criminal convictions in civil cases.

This analogy led the Supreme Court to hold that Heck had sued too early because there was not yet a favorable outcome of his criminal case. Plaintiffs like Heck must instead "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order,

⁴ Johnetta Carr, Daniel Hostetler, Paul Hurt, Delmar Partin, Micah Schoettle, and Keith West.

⁵ 35 of these pardons were of the "Tulia" defendants.

declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.” *Id.* at 487. When the conviction has already been invalidated in one of these ways, the civil rights case is not a vehicle for challenging the criminal conviction and can be filed.

Gubernatorial pardons become relevant in the pardon context because of *Heck*'s reference to a conviction or sentence being “expunged by executive order.” In 2022, the United States Court of Appeals for the Sixth Circuit addressed the question of what that term means for pardons in a case involving a Bevin pardon. *Carr v. Jefferson-Louisville County*, 37 F.4th 389 (6th Cir. 2022), *cert. denied*, 2023 WL 124416 (U.S. Jan. 9, 2023). In 2008, Johnetta Carr entered an Alford plea in connection with several charges arising from the death and robbery of a man she had been dating. In 2019, she applied to Governor Bevin for a pardon, arguing that she was in fact innocent of these crimes.

Governor Bevin granted her request. The pardon, however, did not explicitly state that it was based on his conclusion that she was innocent. Even so, in 2020, she sued a county police department and several officers, alleging that they had fabricated evidence, coerced testimony and withheld exculpatory evidence. The defendants moved to dismiss the case on the ground that it was barred by *Heck*. They argued that the pardon did not invalidate her conviction because the pardon did not rest on the grounds that she was innocent. The district judge agreed and dismissed the case.⁶

The Sixth Circuit, however, reversed, holding that the pardon does not need to rely on an express determination of innocence to satisfy the definition of “expunged by executive order.” The pardon, by its nature, “destroys” or “obliterates” the criminal conviction, thus expunging it. *Carr*, 37 F.4th at 393. The other forms of conviction invalidation do not require a showing of innocence and, the court reasoned, nothing in *Heck* suggests that gubernatorial pardons are an exception. Thus, the Sixth Circuit joined the Seventh and Eighth Circuits in holding that a full and unconditional pardon satisfies the *Heck* invalidation requirement, regardless of whether it rests on an express finding of innocence. *See Savory v. Cannon*, 947 F.3d 409, 428–30 (7th Cir. 2020) (*en banc*); *Wilson v. Lawrence Cnty.*, 154 F.3d 757, 760–61 (8th Cir. 1998).

The holding in *Carr* does not mean that Carr or Keith West, who also filed a federal suit after obtaining a Bevin pardon, will win their cases. It means only that *Heck* does not require them to be dismissed. Gov. Bevin's pardon opens the door to their efforts to seek compensation through their civil rights claims. It does not ensure success.

What Do Pardons Have to Do With Compensation? *State Statutory Compensation*

⁶ A different federal judge in the same district dismissed Keith West's civil rights case on the same grounds. *West v. Louisville Jefferson Cnty. Metro Gov't.*, 2022 U.S. Dist. LEXIS 26898 (W.D. Ky. Feb. 14, 2022). That dismissal was also reversed for the reasons explained in *Carr*. *West v. Louisville Jefferson Cnty Metro Gov't.*, 2023 U.S. App. LEXIS 1992 (Jan. 25, 2023). None of the other four pardoned Kentucky exonerees in the Registry filed suit.

Unless they were to seek and obtain private legislative bills for compensation, the Bevin pardons do not help pardoned individuals obtain state compensation because Kentucky does not have a state wrongful conviction statute. The only realistic path toward possible compensation for pardoned individuals in Kentucky lies with civil rights suits. If Kentucky had a statute, whether a pardon would help an exoneree would depend on the language of the statute.

Previously, a number of states, including Maryland, *required* a pardon in order to compensate an exoneree. Obtaining such pardons is often quite difficult; as a result, most of those states have removed that requirement. However, it remains in Maine and Tennessee.

In Maine, an individual seeking state compensation must file a suit in Superior Court. 14 M.R.S. § 8243. They must prove that they received a full and free pardon with an accompanying written finding by the governor that they are innocent. *Id.* § 8241(2)(c). The lawsuit must be filed within two years of receiving the pardon. *Id.* § 8244. In addition, the court must find that the petitioner is innocent of the crime for which they were convicted. The statute does not say what happens if the governor finds the plaintiff innocent, but the court disagrees. That ambiguity is unlikely to be tested. The Registry lists only three exonerees from Maine, only one of whom was incarcerated, another requirement for compensation.

In Tennessee, the governor has executive clemency power and may issue pardons. This includes the power to grant “exoneration” if the governor finds that the person did not commit the crime for which they were convicted. Tenn. Code Ann. § 40-27-109(a). That gubernatorial exoneration is a prerequisite for seeking compensation from the Tennessee Board of Claims. The Tennessee Board of Probation and Parole makes non-binding recommendations to the governor on pardons and, as we understand it, on grants of exoneration as well.

The requirement to obtain a grant of exoneration from the Governor appears to be an important factor in explaining the low rates of state compensation in Tennessee. The Registry lists 30 exonerees from Tennessee. It is not entirely clear how many of them sought pardons of exoneration because such filings are not public, but we have learned that at least six tried and were unsuccessful in obtaining one.⁷ Four have been granted; three of those pardoned have later received compensation from the Board of Claims.⁸ Why pardons were issued to some exonerees listed in the Registry, but not others, is unknown.

In contrast to the two states that *require* a pardon to obtain compensation, other states have taken two different approaches to the role played by pardons in awarding compensation. There are some variations within these approaches, but statutes generally either mention pardons or they do not.

⁷ Robert Butler, James Harper, Paul House, Leonard Hutchinson, Michael Lee McCormick, and Randall Mills.

⁸ James Green, Lawrence McKinney, and Clark McMillian. It is not yet known whether the fourth, Adam Braseel, has been compensated. A request, from William Arnold, Jr., remains pending.

There are 14 state compensation statutes (including D.C.) that are entirely silent on pardons.⁹ Generally, the plaintiff or applicant must show that they received an order vacating or reversing the conviction (and, if retried, was not convicted) and they were innocent of the crime for which they were convicted. A pardon does not open the door to possible compensation; judicial post-conviction relief does. Nor is a pardon an express substitute for satisfying either requirement. At the same time, the statutes neither require nor forbid a court from considering a pardon on the grounds of innocence as conclusive proof of innocence.

In a number of other states, a pardon on the express grounds of innocence entitles the exoneree to seek compensation.¹⁰ In this sense, the pardon is a door-opener and dispenses with the need for court sanctioned post-conviction relief. The pardon itself may not ensure that compensation is awarded because other statutory requirements must be satisfied, but so long as the entity considering compensation defers to the governor’s determination of innocence, it would certainly resolve the essential question of innocence which is often the most significant hurdle in state compensation cases.

Pardons by the Numbers

Of those 194 people in the Registry who received a pardon, how many have been compensated? We begin with state statutory compensation. Of the 194 pardons, nine were issued in states without a compensation statute (six are from Kentucky) and one was issued to a person ineligible for state compensation because he was not incarcerated. Here are the results with respect to the remaining 184:

| State | # Pardoned | # Paid | # Not Filing | # Denied | # Premature | # Pending |
|-------------|------------|--------|--------------|----------|-------------|-----------|
| Alabama | 1 | 1 | 0 | 0 | 0 | 0 |
| California | 1 | 1 | 0 | 0 | 0 | 0 |
| Connecticut | 1 | 0 | 0 | 0 | 1 | 0 |
| Florida | 1 | 0 | 1 | 0 | 0 | 0 |
| Hawaii | 1 | 0 | 1 | 0 | 0 | 0 |

⁹ Alabama, Colorado, Connecticut, District of Columbia, Florida, Idaho, Indiana, Iowa, Missouri, New Hampshire, New Jersey, Ohio, Utah, and Wisconsin. These states account for only six of 184 pardons studied. Of those six, only one exoneree was compensated.

¹⁰ California, Hawaii, Illinois, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New York, North Carolina, Oklahoma, Texas, Virginia, and West Virginia. In Indiana, Louisiana, Oregon, Nebraska and Vermont, the statutes do not require the pardon to state a finding of innocence, but to receive compensation, claimants must prove innocence. In Maryland, the pardon must state that the conviction “has been shown conclusively to be in error.” Michigan requires new evidence of innocence to result in a gubernatorial pardon. In Rhode Island, the pardon must be issued on grounds “not inconsistent with innocence,” but the claimant must also prove innocence. In Washington, the pardon must be issued on “grounds consistent with innocence,” but the claimant must also demonstrate innocence.

| | | | | | | |
|----------------|-----|-----|----|---|---|---|
| Illinois | 45 | 40 | 5 | 0 | 0 | 0 |
| Indiana | 1 | 0 | 1 | 0 | 0 | 0 |
| Louisiana | 1 | 0 | 1 | 0 | 0 | 0 |
| Maryland | 3 | 3 | 0 | 0 | 0 | 0 |
| Missouri | 2 | 0 | 2 | 0 | 0 | 0 |
| North Carolina | 22 | 17 | 0 | 5 | 0 | 0 |
| Nebraska | 6 | 6 | 0 | 0 | 0 | 0 |
| Nevada | 2 | 2 | 0 | 0 | 0 | 0 |
| Oklahoma | 1 | 0 | 1 | 0 | 0 | 0 |
| Oregon | 1 | 0 | 0 | 0 | 1 | 0 |
| Tennessee | 4 | 3 | 0 | 0 | 1 | 0 |
| Texas | 61 | 38 | 22 | 0 | 0 | 1 |
| Virginia | 30 | 25 | 1 | 4 | 0 | 0 |
| TOTAL | 184 | 136 | 35 | 9 | 3 | 1 |

The data show that, overall, 74% of those pardoned received state statutory compensation and 93% of those pardoned who sought compensation received it. In contrast, in states with compensation statutes, only about 42% of all exonerees (whether pardoned or whose convictions were vacated by a court) received state compensation while 71% of those who sought compensation received it. In short, a much higher percentage of those exonerees who were pardoned were compensated than the entire group of exonerees. The comparison is even starker when one considers some explanations for why some of the pardoned exonerees were not compensated.

In Illinois, four of those pardoned received a pardon on the condition that they would not seek compensation. In Indiana, the person pardoned was ineligible for state compensation because he had won a civil rights case settlement. The two non-filers in Missouri were not eligible for state compensation because Missouri requires that one be exonerated on the basis of DNA testing and neither were DNA exonerees. In North Carolina, four of those denied (each member of the “Wilmington 10”) were found ineligible because they had passed away before their exoneration. Of the 22 people not filing in Texas, 18 were among those exonerated when the “Tulia” scandal came to light, well before the Texas statute was passed. Many Tulia exonerees sought state compensation, but many did not. Each spent relatively little time in jail and had won civil rights case settlements.

On the civil compensation side, here are the results with respect to the 194 pardoned exonerees:

| State | # Pardoned | # Paid | # Not Filing | # Denied | # Premature | # Pending |
|-------------|------------|--------|--------------|----------|-------------|-----------|
| Alabama | 2 | 0 | 2 | 0 | 0 | 0 |
| California | 1 | 1 | 0 | 0 | 0 | 0 |
| Connecticut | 1 | 0 | 0 | 0 | 1 | 0 |
| Florida | 1 | 0 | 1 | 0 | 0 | 0 |
| Georgia | 2 | 0 | 1 | 1 | 0 | 0 |
| Hawaii | 1 | 0 | 1 | 0 | 0 | 0 |

| | | | | | | |
|----------------|-----|----|----|----|---|---|
| Illinois | 45 | 25 | 10 | 7 | 0 | 3 |
| Indiana | 1 | 1 | 0 | 0 | 0 | 0 |
| Kentucky | 6 | 0 | 4 | 0 | 0 | 2 |
| Louisiana | 1 | 0 | 1 | 0 | 0 | 0 |
| Maryland | 3 | 0 | 3 | 0 | 0 | 0 |
| Missouri | 2 | 1 | 1 | 0 | 0 | 0 |
| North Carolina | 22 | 6 | 15 | 1 | 0 | 0 |
| Nebraska | 6 | 5 | 1 | 0 | 0 | 0 |
| Nevada | 2 | 0 | 1 | 1 | 0 | 0 |
| Oklahoma | 1 | 0 | 1 | 0 | 0 | 0 |
| Oregon | 1 | 0 | 0 | 0 | 1 | 0 |
| Pennsylvania | 1 | 0 | 0 | 1 | 0 | 0 |
| Tennessee | 4 | 0 | 3 | 0 | 1 | 0 |
| Texas | 61 | 35 | 23 | 3 | 0 | 1 |
| Virginia | 30 | 7 | 22 | 1 | 0 | 0 |
| TOTAL | 194 | 80 | 90 | 15 | 3 | 6 |

The data show that 52% of the pardoned exonerees filed civil rights claims, compared to national average of 43%. Half of the non-filers were in Texas and Virginia. Of course, these figures are included in the national statistics, but both Texas and Virginia bar civil rights claims when state compensation is paid. That explained 19 of the 23 Texas non-filings and, quite probably, two of the three Texas denials. The bar also accounted for 19 of the 22 Virginia non-filers.

Of the pardoned exonerees who did file a civil rights suit, 79% won a recovery. That is considerably higher than the national overall rate of 52%. Civil rights plaintiffs must show their innocence, which might or might not be reflected in the pardon (assuming that it is admissible), but they must also show that unconstitutional misconduct by a state actor caused their wrongful conviction. There is nothing about a pardon that would make that latter showing easier. Indeed, opinions were not available for all of the cases, but a number that were available held that the claims floundered on that requirement.¹¹

Putting the state and civil rights compensation together, where the number paid reflects the number of people who received state compensation, civil compensation, or both, here are the results:

| State | # Pardoned | # Paid | # Not Filing or denied | # Premature | # Pending |
|-------------|------------|--------|------------------------|-------------|-----------|
| Alabama | 2 | 0 | 2 | 0 | 0 |
| California | 1 | 1 | 0 | 0 | 0 |
| Connecticut | 1 | 0 | 0 | 1 | 0 |

¹¹ Even so, of the 15 civil cases that were unsuccessful, two were likely dismissed when Texas state compensation was received, two were dismissed for lack of prosecution, and one was barred by the statute of limitations.

| | | | | | |
|----------------|-----|-----|----|---|---|
| Florida | 1 | 0 | 1 | 0 | 0 |
| Georgia | 2 | 0 | 2 | 0 | 0 |
| Hawaii | 1 | 0 | 1 | 0 | 0 |
| Illinois | 45 | 40 | 4 | 0 | 1 |
| Indiana | 1 | 1 | 0 | 0 | 0 |
| Kentucky | 6 | 0 | 4 | 0 | 2 |
| Louisiana | 1 | 0 | 1 | 0 | 0 |
| Maryland | 3 | 0 | 3 | 0 | 0 |
| Missouri | 2 | 1 | 1 | 0 | 0 |
| North Carolina | 22 | 17 | 5 | 0 | 0 |
| Nebraska | 6 | 5 | 1 | 0 | 0 |
| Nevada | 2 | 2 | 0 | 0 | 0 |
| Oklahoma | 1 | 0 | 1 | 0 | 0 |
| Oregon | 1 | 0 | 0 | 1 | 0 |
| Pennsylvania | 1 | 0 | 0 | 0 | 0 |
| Tennessee | 4 | 0 | 3 | 1 | 0 |
| Texas | 61 | 57 | 4 | 0 | 1 |
| Virginia | 30 | 27 | 3 | 0 | 0 |
| TOTAL | 194 | 151 | 36 | 3 | 4 |

The data show that 78% of the pardoned exonerees received some compensation. In contrast, nationwide, about 47% of the exonerees wrongfully convicted in state court listed in the Registry are compensated. It is true that the substantial majority of pardoned exonerees recovering compensation on these charts are from Illinois, North Carolina, Texas and Virginia, states which generally have high rates of filing and awards. But those high rates include both pardoned and unpardoned exonerees.

Conclusion

In sum, receipt of a gubernatorial pardon correlates strongly with the receipt of compensation. That is good news for those appropriately exonerated by the governor, rather than by court order. At the same time, receipt of a pardon under more questionable circumstances, like some of those for which former Governor Bevin was criticized, does not mean that compensation necessarily follows. The exoneree still needs to demonstrate their innocence.

As seen in the *Carr* case, Governor Bevin's pardons did not expressly state that they were issued because he concluded that the recipient was innocent of the crime for which they were convicted. A more difficult question, but apparently one that is, so far, hypothetical, would be how the entities that administer compensation – courts and administrative agencies – would treat a pardon that specifically stated that it was based on innocence when there is some doubt about whether that is really true.

In the absence of a state requirement that reasons for a conclusion that the convicted person is actually innocent be stated in the pardoning instrument, any expressed reasons for it might come (if at all) in another form – a press conference, a press release or a tweet. To what

extent would a court regard that separate rationale as sacrosanct as the pardon itself? Would a court believe that it had an independent obligation to determine whether the asserted justification was supportable, even if by an extremely deferential standard of review? No court appears yet to have been faced with such a decision. So long as the governor or other pardoning entity is regarded as exercising the pardoning power judiciously, this scenario is unlikely to arise.

Whether or not the pardoning instrument mentions innocence, the data show, perhaps not surprisingly, that those receiving pardons are more likely to seek and to obtain compensation for their wrongful convictions than the general population of exonerees wrongly convicted in state court.