

# COMPENSATION UNDER THE MICROSCOPE:

## WISCONSIN

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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 with 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 crack that door open just a bit wider. For states with particularly ungenerous statutes, but without the desire to change them, the Wisconsin approach could offer an appealing alternative. This report examines the Wisconsin statute and the case, brought by [Derrick Sanders](#), that led to its reinterpretation.

### 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 that they were innocent by clear and convincing evidence. *Id.*, § 775.05(3). If the Claims Board finds that 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. Given the limited compensation offered by the Wisconsin statute, wouldn't the Claims Board almost<sup>1</sup> always find it to be inadequate? If it does, the statute clearly requires the Claims Board to send a report with a recommendation for a supplemental amount to the legislature. Of course, there is no requirement that the legislature do anything with the report. But, can the Claims Board avoid the question by not addressing a petitioner's request for supplemental compensation? The Wisconsin Court of Appeals answered no.

### Wisconsin By the Numbers

As of July 2022, 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 22 have filed claims., Wisconsin's filing rate is significantly below the national average of 55%. Wisconsin's low compensatory awards is a logical explanation.

Of the 22 filers, 16<sup>3</sup> were granted compensation and six<sup>4</sup> were denied. Each of those six was 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

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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.

<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 and Michael Winston.

that 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	14	\$28,464,621	\$82,244
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 requested, which would bring his total compensation \$1 million. As of June 2022, the legislature had not acted on that recommendation.

#### 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.

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<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.

In 2019, Sanders filed a claim with the Claims Board, seeking \$25,000 plus nearly \$6 million in additional damages. *Derrick*<sup>6</sup> v. *State Claims Bd.*, No. 2021AP373, 2022 Wisc. App. Lexis 501, at \*6 (Wisc. Ct. App. June 9, 2022). Unlike Stinson, he asked for far more than just \$5,000 for each year of his wrongful incarceration. In addition, he requested compensation for lost wages as well as damages arising from emotional distress, physical harm and lost property. *Id.* at \*6-7.

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.* at \*7. It did not address his claim for additional damages. *Id.* at \*7-8.<sup>7</sup> Sanders filed a petition for 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. That begged the question of whether it was required to make such an inadequacy determination in the first instance.

In a 2-1 decision, the 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.” *Id.*, at \*4.

The statute is not a model of draftsmanship. The first sentence seems to demand the impossible: that the Claims Board determine an amount of equitable compensation within the \$25,000 limit. The second sentence appears to acknowledge that dilemma and requires the Board to determine an equitable amount and to report that amount to the legislature if it finds the statutory caps are inadequate.

One possible reading of the statute, adopted by the dissent, is that it requires the Board to determine what amount would equitably compensate the petitioner *within* the very small, capped amounts set forth in the statute. Then, the statute’s use of the term “if” permits, but does not require, the Board to make a second determination – whether that amount is generally equitable. Under this reading, the Board can choose to avoid such a decision, as it did with the Sanders claim.

As a practical matter, if an exoneree does not request supplemental compensation it is understandable that the Claims Board would not make that second determination. It was not asked to do and, in fact, most exonerees filing claims with the Board have simply asked for the

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<sup>6</sup> The case is mis-named in the LEXIS version of the case report.

<sup>7</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.

statutory amount and nothing more. A small number, like Sanders, have made the additional request as the statute and application allow. Given that statutory invitation to seek supplemental compensation, it seems wrong to allow the Board simply to ignore an exoneree who accepted it. Instead, it would make more sense for the statute to require the Board to determine the equitable compensation amount, not an easy task, and then to determine whether that selected amount exceeds the cap in the statute. The Board, of course, cannot provide more than the capped amount, but a finding of insufficiency triggers the duty to report to the legislature.

Thus, the debate between the majority and dissent is a familiar one – the extent to which a statute should be interpreted strictly in accordance with its language, when doing so is in tension with apparent statutory purpose. The majority essentially took the latter approach. It reasoned that the terms “equitably” and “adequate” in the statute quoted above require the Board to exercise a measure of discretion. That exercise of discretion is reviewable by the courts. Courts can only review the exercise of that discretion if the basis for the Board’s conclusions is explained. The Board’s silence in Sanders’s case precluded effective judicial review. In an odd sense, the harmed party here was more the reviewing court and less Sanders himself.

When a petitioner, like Sanders, contends that the equitable compensatory amount exceeds the statutory cap, the Board (having already determined their eligibility) must, the court found, expressly address that request. If the Board agrees, then it must file the report. If it does not, then it must explain why the cap is, in that particular case, fair.<sup>8</sup> That determination is reviewable, presumably under an arbitrary and capricious standard of review. What the Board simply cannot do is to avoid addressing the request for supplemental compensation. The majority put it this way:

*“As explained above, the statute requires the Claims Board to exercise its discretion to determine whether, when it has awarded the statutory maximum amount and the petitioner has requested additional compensation above the statutory maximum amount, the amount that it is able to award is or is not adequate compensation. . . . Saying that it suffices simply to vote to award the statutory maximum, without any fact-finding or rationale supporting the discretionary determination whether the statutory maximum is or is not adequate, eliminates the parameters that guide our review of the exercise of discretion.”*

*Id.* at \*5.

### Conclusion

It remains possible that this divided court’s decision could be reviewed by the Wisconsin Supreme Court. If the decision stands or is later affirmed, what impact would that have in Wisconsin?

It is very difficult to conclude, in a case where the petitioner is found to be eligible for compensation, that the capped amounts set forth in the statute are “adequate” whether adequacy is measured in comparison to the compensatory metrics of other state statutes or the outcomes in

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<sup>8</sup> That did not happen in the Forest Shomberg case described in footnote 1 above.

successful federal civil rights cases. Based on the Sanders case, the Claims Board cannot dodge that issue by ignoring it. It must explicitly state why the capped amounts are, in any particular case, adequate to compensate the exonerated petitioner. An explanation that the cap is adequate, which is reviewable, is unlikely to be very persuasive.

It may then be that in the future, the Claims Board will make more “inadequacy” reports to the state legislature. More exonerees will ask it to do so. Of course, the legislature can ignore them. However, the five-person Claims Board does include a designee of the Governor and representatives of the Assembly and Senate Finance Committees. The political appointees on the Board may be able to persuade their colleagues to consider repeated “adequacy” reports on a case-by-case basis.

It is not possible to predict whether more “inadequacy” reports will yield additional supplemental awards or legislation to raise the caps. So far, Wisconsin has rejected proposals to increase its statutory compensation caps. The door for increased compensation in particular cases in Wisconsin, though, may have opened just slightly. That modest opening could be one that is replicated in other states.

The Wisconsin statute, inadequate in other respects, does offer an express statutory opportunity for a decision-maker to report to the legislature that the compensation caps are inadequate, at least in particular cases. Other states with modest caps could consider a statutory amendment that expressly authorizes those legislatures to receive recommendations for an enhanced compensation award on a case by case basis. There is no obligation for such state legislatures to act, but repeated knocks on the door in Wisconsin, or elsewhere, might not fall on deaf ears.