

COMPENSATION UNDER THE MICROSCOPE

INDIANA

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Introduction

On November 1, 2019, a compensation statute to compensate the wrongfully convicted became law in Indiana. On November 1, 2021, the deadline for previously exonerated people to file claims has passed. Unlike any other state compensation statute, the statute assigns decision-making authority over claims to the Indiana Criminal Justice Institute (ICJI), a planning agency. Indiana offers an interesting opportunity to assess how the ICJI has performed its tasks and the extent to which people wrongfully convicted in Indiana have benefited from the new statute.

The Statute

In 2019, the Indiana legislature passed, and the Governor signed into law, legislation (P.L. 165-2019) creating a wrongful conviction compensation process. The substantive requirements for compensation are relatively standard. The claimant must demonstrate that they were sentenced to the Department of Corrections or a county jail following a criminal conviction; that they were pardoned by the governor, or their conviction was vacated, reversed or set aside; and that they are “actually innocent.” IND. CODE § 5-2-23-1(b).

It is clear from the statute that acquittal on retrial is not enough to show innocence. *Id.* at 2(a). The definition of “actual innocence” in Indiana is unlike that of most other state wrongful conviction compensation statutes. It is not enough for the claimant to show that they did not commit the offense. *Id.*, § 5-2-23-2(1). In addition, the statute requires the claimant to show a further negative—that they did not participate in the offense or its planning or preparation. Specifically, the claimant must show that they did not “commit; take part in; or plan, prepare for, or participate in the planning or preparation of another criminal act in connection with that offense.” *Id.* § 5-2-23-2.

Indiana is an “administrative decider” state, meaning that at least the initial decisionmaker is an administrative entity that decides a claim for compensation based on a filed application and without a mechanism for the government to respond. “Administrative decider” states, in theory, can decide these claims more quickly and efficiently, because they are not subject to adversarial litigation. That sort of litigation is a feature of processes in “court decider” states. In those states, adjudication of a claim looks like traditional litigation, with the filing of a complaint against the state, followed by discovery, briefing and potential trial or settlement along the way.

Intuitively, “court decider” states take longer to decide these cases. However, the adversarial process, slow as it can be in certain cases, does have the feature of surfacing the issues that are in dispute. For example, in a state in which a potential defense is that the plaintiff caused or contributed to their prosecution or conviction through some act or omission, the

plaintiff has the burden of proving the absence of that potential bar to recovery. Presumably, in the answer to the complaint, the government would plead that bar as an affirmative defense. When it does, the plaintiff will know that they will have to assemble the necessary evidence to surmount that defense. Ultimately, the judge or jury, if there is one, will decide that issue in accordance with general legal principles tied to the burden of proof, and the underlying law would be set forth in jury instructions or the judge's ultimate decision in the case. Thus, an approach to evaluating these defenses would be developed in that state that might well be adopted in subsequent cases.

In "administrative decider" cases where, at least sometimes, the basis for determination is less transparent, a claimant could be unsure about how much evidence they must present in their claim to prove certain "negatives." Especially when the statute is new and precedent or customs have not been well established, it may not be clear what the administrative decider really expects as part of the claims package. That may get sorted out over time as cases are decided and attorneys who specialize in these cases become familiar with the approaches taken by the decision-making agency. This is why the first cases decided under a new statute could be the most important. But, the principle adopted in "administrative decider" states takes the form of custom and practice, rather than a judicial decision with precedential value.

When originally passed, the Indiana statute did not have a standard by which the claimant had to prove actual innocence. In 2022, by passing Pub. L. 146-2022, the legislature opted for a preponderance of the evidence standard, effective July 1, 2022. IND. CODE § 5-2-23-2(b), 8(b)(1). In so doing, it rejected a proposal by the Institute for the more rigorous standard of clear and convincing evidence.

While possible in many states, the Indiana statute does not allow an exoneree to receive both state statutory compensation and a federal civil rights recovery.

According to the Indiana statute, if the claimant *previously* received compensation of any sort from the state or a political subdivision of Indiana or state or local officer or employee related to the conviction or associated criminal investigation, they are barred from seeking state compensation under this statute. *Id.* §§ 5-2-23-1(a), (b)(4)(B). Thus, state compensation is not available for any exoneree who has received a settlement or verdict against, for example, a state county or local police officer for federal civil rights violations.

Federal civil rights claims that are pending at the time state compensation is awarded must be dismissed. At the end of the statute is a provision that states that compensation may not be paid to a person with a *pending* civil rights case that could result in compensation for the wrongful conviction. *Id.* § 5-2-23-8(e)(2). This provision caused some exonerees to face a difficult choice: should they dismiss their federal civil rights case in order to get state compensation, or continue with the civil rights case and forego state compensation?

On average, civil rights case recoveries (when they happen) are more lucrative than state compensation. But, civil rights cases result in a settlement or verdict for the plaintiff only about half the time. As written, the Indiana statute would permit someone to *pursue* both claims. They might wait to see if state compensation is granted. If it is, then they have a choice to make. If the

civil rights case recovery comes first and is greater than what they would receive from the state, they would presumably dismiss their state claim.

Anyone accepting state compensation must waive all future claims against the state, state agency, any political sub-division or official or employee of such an entity. *Id.* § 5-2-23-4, 8(e). In fact, the claim application requires the claimant to sign such a waiver. *See* <https://www.in.gov/cji/files/56817-5-21-fill-in.pdf>. Thus, future civil rights cases are prohibited if state compensation is paid.

Unlike many state wrongful conviction compensation statutes, which require a complaint for damages to be filed in a state trial court, claimants file claims with the Indiana Criminal Justice Institute (“ICJI”). *Id.* § 5-2-23-8(a). According to its website, the ICJI is “the state planning agency for criminal justice, juvenile justice, traffic safety and victim services. The institute develops long-range strategies for the effective administration of Indiana's criminal and juvenile justice systems and administers state and federal funds to carry out these strategies.” *About ICJI*, IN.GOV, <https://www.in.gov/cji/about-icji/> (last visited June 4, 2022).

The ICJI has posted the two-page application on its website. It has also posted administrative rules governing its process on its website. LSA Document 19-573(E). <http://iac.iga.in.gov/iac/irdin.pdf?din=20191106-IR-205190573ERA>.

If the ICJI grants the claim, the claimant is entitled to \$50,000 for each year of incarceration. IND. CODE § 5-2-23-3. Pretrial detention is not counted. *Id.* § 5-2-23-3(b). The award is to be paid out over a five-year period. *Id.* § 5-2-23-3(c). The opportunity to obtain non-compensatory social services is phrased in the negative. The statute is to be interpreted not to prevent a person from enrolling in mental health treatment programs, substance abuse treatment, community transition programs or other reintegration programs. *Id.* § 5-2-23-6(b). There is no apparent affirmative entitlement to such benefits.

The statute required the application to be filed by November 1, 2021 or two years from the pardon or judgment setting aside the conviction. *Id.* § 5-2-23-8(a). Thus, those exonerated prior to November 1, 2019 are now barred from seeking a recovery under the statute. Compensation may not be paid to the estate of or fiduciary of a wrongfully convicted person. *Id.* § 5-2-23-8(f).

The ICJI has established an internal review process. Staff investigate the claims, request additional information if needed and make recommendations to the ICJI director. LSA Document 19-573(E), § 6. If approved, the claims are decided by the ICJI’s 18-member Board of Trustees. LSA Document 19-573(E), § 3(5). The names of the members of the Board are on the ICJI’s website. <https://www.in.gov/cji/about-icji/>. The Board meets quarterly. The ICJI’s denial notices are brief, identifying the provision of the statute that the applicant failed to satisfy. The notices do not offer an analysis as to why the applicant was found not to have met the provision in question. According to the denial notices, the claimant has 18 days from the date of the notice to file an appeal to the ICJI’s Executive Director.

The Director will then submit the appeal to the Indiana Office of Administrative Law Proceedings, where it will be assigned to an Administrative Law Judge. Appeals of denials of claims by an ALJ are governed by Indiana Code § 4-21.5.5. *See* IND. CODE § 5-2-23-10. This section of the Indiana Code establishes the only available avenue for seeking judicial review of agency decisions. IND. CODE § 4-21.5.5-1. The statute provides that a person, against whom an agency decision was directed, may seek judicial review by filing a petition with the court. *Id.* §§ 4-21.5-5-3, 7. An exoneree must file for review within 30 days after the exoneree received notice of the agency’s final decision. *Id.* § 4-21.5-5-5. Decisions made by the reviewing court “are appealable in accordance with the rules governing civil appeals from the courts.” *Id.* § 4-21.5-5-16.

The Numbers

As of June 28, 2022, the National Registry of Exonerations had recorded 41 Indiana exonerees wrongfully convicted in state court.¹ One was not incarcerated, leaving 40 potentially eligible to apply for and receive compensation under the new statute.

Sometimes, states are concerned that these sorts of statutes will generate large numbers of claimants, many of whom are not eligible. They worry that processing or litigating all of these claims, many of which will be unsuccessful, will be expensive because of the volume of expected cases. That has not happened in Indiana. According to the ICJI, 27 people filed claims before November 1, 2021. Between November 1, 2021 and May 26, 2022, it received three more claims, each of which remains pending.

Here is what happened with those first 27 claims:

- 1 was denied because the claimant was not sentenced to the Department of Correction or a county jail as a result of a criminal conviction. This decision was not appealed.
- 8 were denied because they did not meet the definition of “actually innocent.”
 - 3 did not appeal.
 - 2 did appeal and the appeals were pending as of June 2022.
 - 3 appealed and the appeals were denied at the ALJ level. No further appeals were filed.
- 1 was denied because it failed to satisfy either of these requirements and the claimant’s appeal was denied.
- 12 claims were pending as of June 2022.
- 5 claims were granted, totaling \$1,255,616. The largest award was given to Kristine Bunch, who was a leader in advocating for the passage of the statute. The award followed Bunch’s dismissal of a federal civil rights suit that she had filed in 2014. One of the five granted claims, to William Alexander, was not paid because he is currently incarcerated. Two claims were paid to persons not listed in the Registry.

How does that map onto those listed in the Registry? Of the 40 in the Registry eligible to apply, two had not yet done so but the statute of limitations had not run as of June 2022. Of the

¹ Of those 41 cases, James Hill appears twice as he was exonerated of two separate crimes.

remaining 38, only 14 applied to the ICJI, meaning that most of the exonerees in the Registry did not apply.

Why didn't those 24 apply? Some categorizations are possible:

- Eight² were barred from filing because they received prior settlements in civil rights cases. In total, the average settlement in these cases was over \$275,000 per year, significantly more than state compensation would allow.
- Five³ had pending civil rights claims. This did not preclude them filing; they would have had to decide whether or not to accept state compensation if it were granted and if the civil rights case remained pending.
- Two⁴ died before the statute was passed and their heirs or estates were precluded by statute from applying on their behalf. IND. CODE § 5-2-23-8(f).
- One⁵ was incarcerated, convicted of a subsequent rape.
- Eight⁶ involved exonerations between 1991 and 1998, more than 20 years prior to the passage of the statute. Of those, two were wrongly imprisoned for less than a year and two were wrongly convicted of child sex abuse.

Of the 13 exonerees on the Registry who did file claims, three were granted (Alexander, Bunch and Jessie Laudig), one was denied for failure to show innocence and was not appealed (Christopher Allen) and 10 claims remained pending as of June 2022. The ICJI denied the claim of one of those ten, Larry Fox, Sr., for failure to show innocence and his appeal remained pending. Of the nine other claims, three⁷ have pending civil rights claims. Unless those are dismissed, the state claims were very likely to be denied. One, Harold Buntin, received a small settlement in a civil rights case, but that case did not seem to arise directly from his wrongful incarceration.

Four⁸ of the pending cases involved exonerees who previously filed, but lost, federal civil rights cases. A review of the opinions finding for the defendants suggests that the grounds for those decisions would not preclude the possibility of success on the state compensation claims.

Conclusions

The books remain open in Indiana; there are a number of pending cases. So, definitive conclusions are not yet possible. But that points to one important observation—that cases are generally not decided quickly in Indiana. The case volume is not particularly high, but the ICJI has a large board and meets only quarterly.

² David Camm, Ralph Jacobs, Billy Julian, Larry Mayes, Brian Nierynck, Christopher Parish, Christopher Smith, and Jerry Watkins.

³ William Barnhouse, Keith Cooper, Walter Goudy, James Hill and Mack Sims.

⁴ John Jeffers and Dwayne Scruggs

⁵ Michael Gaby

⁶ William DeMotte, Robert McCullough, Pamela Reed, Gerald Sailors, Charles Smith, Deama Thomas, Donald Wilson, and Danny Woods

⁷ Willie Donald, Roosevelt Glenn, and Darryl Pinkins

⁸ Lana Canen, Steven Everling, Jacqueline Latta, and Roger Latta.

An analysis of activity in Indiana belies any notion that all people on the Registry get compensated. That isn't true in Indiana, and it is not true nationally either. When state legislatures are considering these statutes or considering changing existing statutes, the cost is a primary issue. Fiscal notes to proposed legislation assuming that all exonerees in the Registry will seek compensation and win exaggerate the costs of these statutes. So do fiscal notes that assume a large volume of cases and assess the costs of processing them. In Indiana, only about one-third of Registry exonerees sought compensation and only thirty people have filed claims.

In Indiana, the biggest groups of non-filers were those barred because they had received prior civil rights recoveries and those who were exonerated long before the statute was passed. The latter category underscores the important work of organizations that seek to contact exonerees to alert them of perhaps otherwise unknown opportunities to receive compensation.

We do not yet know the results of the claims for compensation sought by most Registry exonerees in Indiana, but one is curious, although not uncommon. There are a fairly significant number of people listed in the Registry who, obviously, satisfy the Registry's standard for entry, but who nevertheless fail in their efforts to be compensated because they do not prove their innocence. Figuring out why this happens is easier in "state decider" cases where a judge writes an opinion setting forth the evidence and the legal reasoning for denying the claim. In "administrative decider" states like Indiana, the rationale for the denial may not be as thoroughly explained. That is certainly true so far in Indiana where the decisions state the statutory basis for the denial, but do not set forth the analysis for drawing that conclusion.

Unexplained determinations, particularly those that are not appealed, are problematic because researchers, the public and the exonerees themselves are left uncertain as to whether the decisionmaker correctly applied the statute and the underlying facts. Where there are substantial numbers of unexplained denials (especially in cases involving Registry exonerees), this lack of transparency makes opportunities for reforming the statute much more difficult.

The data for this report was provided by the ICJI. This report will be updated periodically, as more claims are decided.