



## **RESTORING INNOCENCE**

The Need for Wisconsin to Adequately Compensate Wrongfully Convicted Individuals

*A Report of the Wisconsin Innocence Project*

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## INTRODUCTION

In 2006, David Sanders was wrongfully convicted of sexually assaulting a child. Sanders, a former Franciscan brother, was working as a teacher when police arrested him based on a mistaken identification. A victim of a childhood sexual assault identified Sanders from a photo lineup as the “Brother David” who had molested him 20 years prior.

Sanders spent seven months in prison before authorities identified the real perpetrator and released Sanders. He found himself stranded in a strange city with no money and no place to stay. While in prison, he lost nearly \$40,000 in earnings, while interest on his debts accumulated. After his release, Sanders tried to piece his life back together. He managed to regain his teaching position, but his previously clean credit was destroyed. He was months behind in rent, and only his good relations with his landlord kept him from eviction.

In August 2007, Sanders applied for compensation under Wisconsin Statute § 775.05. Upon learning of Sanders’s claim, Milwaukee District Attorney John Chisholm said, “If there’s \$100,000 available for him, if there’s \$1 million that’s available for him, God bless him, he should have it.” However, the compensation statute limited Sanders to requesting only \$23,240, broken down into \$5,000 for time served (the maximum allowed for each year of wrongful incarceration), and \$18,240 for legal fees. The Claims Board did not hear Sanders’s claim until January 24, 2008, nearly six months after he filed it. At the hearing, the Board found clear and convincing proof of Sanders’s innocence and granted him \$23,240. Although Sanders was glad to eventually receive the compensation, he still had to declare bankruptcy because of the ordeal.

Sanders is not alone. In 2001, Evan Zimmerman was wrongfully convicted of first-degree intentional homicide and spent over three years in prison before the prosecutor dismissed all charges against him. Despite his former career as a police officer, Zimmerman faced substantial hurdles when searching for employment. And when Zimmerman’s arrest appeared on a background check for a janitorial job, he was told that “he must have done something wrong to get arrested in the first place.” Zimmerman died in 2007 without ever receiving any compensation from the state.

Most recently, Robert Lee Stinson was exonerated after spending 23 years in prison for a murder he did not commit. Sadly, Stinson was released without a public support system, little work experience, limited monetary funds, and a 23-year employment gap he has to explain to future employers. At most, under Wisconsin’s current law, Stinson may recover \$25,000 for wrongfully spending 23 years in prison.

Wrongfully convicted individuals like David Sanders, Evan Zimmerman, and Robert Lee Stinson deserve more generous and timely compensation packages than Wisconsin currently offers. Even though Sanders spent only seven months behind bars, he left prison facing severe economic hardship. Most wrongfully convicted individuals serve much longer sentences and face even more hardships upon release. Apart from the horrors of prison life, the wrongfully convicted have few resources to draw upon when set free, and their families have often incurred enormous attorneys’ fees related to their cases. While in prison, they miss out on educational opportunities, job training, and career advancement opportunities.

To provide adequate compensation, a statutory scheme must realistically account for these losses. Wisconsin needs to reform its statute to adequately restore innocence for the wrongly convicted and once again become a leader in compensating the wrongfully convicted.

This report addresses why Wisconsin Statute § 775.05 does not adequately address the many legitimate needs of the wrongly convicted and proposes improvements to the current statute.

### SUMMARY OF RECOMMENDATIONS

1. Wisconsin's current statutory maximum for compensation of \$5,000 per year of wrongful imprisonment, capped at a total of \$25,000, must be increased to *at least* \$50,000 per year, with no cap on the total award. This amount needs to be indexed to inflation in order to reflect fluctuations in the economy. Further, the compensation should be exempt from income taxes.
2. Current law should be clarified to ensure that individuals who are awarded compensation are additionally entitled to reimbursement for *all* reasonable attorney fees and court costs associated with the individual's defense, post-conviction, and compensation proceedings, as well as *all* other costs incurred related to the defense, such as DNA testing or private investigation.
3. Wrongfully convicted individuals who receive compensation should be provided a caseworker by their county of residence to identify and administer county services, including but not limited to counseling, healthcare services, education, and vocational assistance.
4. Individuals who have their conviction reversed or vacated on grounds not inconsistent with innocence should have their criminal record related to the wrongful conviction automatically removed from electronic online court records such (CCAP) at the time of the reversal of conviction. Additionally, upon a successful petition for compensation, or on a motion to the circuit court upon dismissal of the charges, an individual should be entitled to expungement of his or her record related to the wrongful conviction.
5. Current law should be revised so that wrongfully convicted individuals only have to prove their innocence by a *preponderance of the evidence* like other claimants for damages in civil actions, rather than the currently statutorily prescribed higher burden of *clear and convincing evidence*.
6. The statutory provision barring an individual from receiving compensation if he or she contributed in any way to his or her conviction should be repealed. An innocent individual should not be barred from recovery due to a confession or admission later found to be false or a guilty plea to a crime the claimant did not commit.
7. Wrongfully convicted individuals should be guaranteed the assistance of a public defender to navigate the compensation process if they are not already represented by private counsel.

8. Claims for compensation should be heard and decided before an Administrative Law Judge (ALJ) with the Division of Hearings and Appeals, just as cases arising under the Department of Justice's Crime Victim Compensation Program are heard, rather than the Claims Board. Decisions by an ALJ granting compensation should be promptly forwarded to the Claims Board for disbursement. In addition, compensation claims must be promptly heard and processed so that exonerees can receive compensation and begin to rebuild his or her life as soon as possible after release.
9. To provide transitional support, individuals whom the court finds more likely than not to be innocent at the time of reversal of their conviction should be awarded a reasonable transitional assistance financial grant within ten business days of the order of reversal, the amount of which would then be deducted from a compensation award later received.

#### PROPOSED REVISIONS TO WISCONSIN'S COMPENSATION STATUTE

- I. **To rectify the severe shortcomings of the current compensation system, Wisconsin should provide adequate compensation for the wrongly convicted by increasing compensation amounts, explicitly authorizing reimbursement for attorney fees and other fees related to the wrongful conviction, offering non-monetary compensation, and expunging the criminal records related to the wrongful conviction.**

- A. *Wisconsin must increase its yearly and total compensation amounts and index these to inflation.*

Wisconsin must substantially raise its yearly and total monetary compensation award. If Wisconsin does set a fixed amount, either yearly or as a cap, that amount should *at least* meet the federal norm of \$50,000 per year and must be indexed to inflation in order to reflect fluctuations in the economy. Further, Wisconsin must follow the lead of other states and recognize that these compensation awards are not income and should not be taxed as such.

Wisconsin's current statute provides the lowest annual monetary compensation amount in the nation (*See Appendix B*).<sup>1</sup> The current amount provided by statute—which has not been adjusted since 1980—provides only \$5,000 per year of incarceration, capped at a total of \$25,000.<sup>2</sup> This makes Wisconsin's *total* award cap half the amount that Congress recommends offering *per annum*.<sup>3</sup>

Developments in other states demonstrate the inadequacy of Wisconsin's monetary provisions. The state with the second lowest yearly provision, Louisiana, awards \$15,000 per year,<sup>4</sup> three times the amount that Wisconsin awards. Other states provide even more generous

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<sup>1</sup> 25 states, plus Washington, D.C. have statutes providing some form of compensation in place. The Innocence Project – Fix the System: Priority Issues: Exoneree Compensation, <http://www.innocenceproject.org/fix/Compensation.php> (last visited Sept. 24, 2008).

<sup>2</sup> WIS. STAT. § 775.03(4) (2007).

<sup>3</sup> *See Appendix B.*

<sup>4</sup> LA. REV. STAT. § 15:572.8 (2008).

amounts: New Jersey awards the wrongfully convicted up to \$20,000 per year,<sup>5</sup> Ohio provides up to \$40,330,<sup>6</sup> Vermont provides up to \$60,000,<sup>7</sup> and Texas provides up to \$80,000, plus an annual annuity of \$80,000.<sup>8</sup> Notably, the federal statute grants up to \$50,000 per year of incarceration, and up to \$100,000 per year spent on death row.<sup>9</sup> Congress recommends that states should use the federal statute as a model for their compensation statutes.<sup>10</sup>

Not only is Wisconsin's rate of \$5,000 per year the lowest in the country, but its cap on total compensation of \$25,000 is the second lowest.<sup>11</sup> Some jurisdictions, including Alabama and Washington, D.C., have no cap at all.<sup>12</sup> Similarly, New York and West Virginia permit any award deemed fair and reasonable compensation.<sup>13</sup> Caps in other states range from \$150,000 in Louisiana to \$2,000,000 in Florida.<sup>14</sup> Wisconsin's cap is antiquated and does not reflect the lost income, investments, properties and opportunities, or the emotional hardships, suffered by the wrongly imprisoned.

Furthermore, recognizing that sentences vary and economic conditions fluctuate over time, other states have adopted a variable formula for calculating compensation. New Jersey grants a monetary stipend for each year of incarceration not to exceed the greater of twice the exoneree's yearly personal income prior to incarceration, or \$20,000.<sup>15</sup> Utah, grants a stipend based upon the average non-agricultural income at the time of the prisoner's release.<sup>16</sup> Alternatively, New York awards damages "in such sum of money as the court determine[s] will

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<sup>5</sup> See N.J. STAT. ANN. § 52:4C-1 (2008).

<sup>6</sup> See OHIO REV. CODE ANN. § 2743.49 (2008).

<sup>7</sup> See VT. CODE ANN. § 5574 (2008).

<sup>8</sup> H.B. 1736, 81st Leg., Sess. 81-R (Tex. 2009).

<sup>9</sup> There is also no maximum cap on compensation. See 28 U.S.C.S. § 2513 (2008).

<sup>10</sup> The Innocence Project, *supra* note 1.

<sup>11</sup> Only New Hampshire's statute cap is lower, providing a maximum of \$20,000 for the entirety of the wrongful conviction. N.H. REV. STAT. ANN. § 541-B:14.; For a comparison of compensation rates of other states, see Appendix B.

<sup>12</sup> No maximum amount is specified. See 2001 Al. Pub. Act 659; D.C. CODE §2-421 (2008).

<sup>13</sup> "[I]t shall award damages in such sum of money as the court determines will fairly and reasonably compensate him." W. VA. CODE § 14-2-13a (2008). See also N.Y. CT. CL. Act §8-b (2008).

<sup>14</sup> LA. REV. STAT. § 15:572.8; Fl. H.B. 1025 (2008). Maine has a cap of \$300,000. 14 ME. REV. STAT .ANN. tit. 14, § 8241 (2008). Massachusetts has their cap set at \$500,000. MASS. GEN. LAWS. CH. 258 § 5 (2008).North Carolina's cap is \$750,000. N.C. GEN. STAT § 148-82 (2008). Tennessee's cap is \$1,000,000. TENN. CODE ANN. § 9-8-108.

<sup>15</sup> 2008 Ut. Ch. 358; N.J. STAT. ANN. § 52:4C-5 (2008).

<sup>16</sup> 2008 Ut. Ch. 358.

fairly and reasonably compensate him,” enabling the amount of compensation to fluctuate based on the individual’s particular situation.<sup>17</sup>

In addition, several states have created alternative compensation remedies for the wrongfully convicted. For example, Texas also provides lost wages as well as any unpaid child support plus interest.<sup>18</sup> Louisiana and Tennessee automatically grant survivor benefits on awarded compensation, thus making any unpaid compensation part of the exoneree’s estate.<sup>19</sup> California declares that compensation awarded is not to be considered income for tax purposes.<sup>20</sup> These provisions further allow exonerees to avoid the economic burdens that resulted from their wrongful convictions.

Many states require individuals who seek compensation under a state statute to offset damages awarded in a civil suit from the amount awarded under a compensation statute.<sup>21</sup> Offsetting the damages preserves the exoneree’s right to bring suit against the state and does not result in a windfall because damages awarded by the court are deducted from the compensation awarded under a statute.

*B. Wisconsin must adequately authorize compensation for attorney fees and all other fees associated with the wrongful conviction.*

Wisconsin’s statute should be clarified so that it fully compensates the wrongfully convicted for all fees incurred that are associated with the wrongful conviction. The statute should explicitly authorize the award of all reasonable attorney fees associated with the individual’s original trial and any later proceedings related to the charge, as well as any other costs associated with the defense, such as DNA testing or investigator fees, and reasonable costs incurred while pursuing compensation.<sup>22</sup>

Other states’ statutes are unambiguous regarding reimbursement for attorney fees. Compensation statutes in six states currently provide clear entitlement to awards for attorney’s fees incurred by the defendant during litigation related to the charge: Illinois, Iowa, New Jersey, Ohio, Texas, and Vermont.<sup>23</sup>

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<sup>17</sup> N.Y. CT C ACT § 8-b (2008).

<sup>18</sup> TEX. CODE ANN. § 103.001 (2007).

<sup>19</sup> LA. REV. STAT. § 15:572.8(N)(3); TENN. CODE ANN. § 9-8-108(E)(i)(c).

<sup>20</sup> CAL. PENAL CODE § 4904.

<sup>21</sup> See 2008 FL H.B. 1025; MASS. GEN. LAWS. CH. 258 § 4; MO. ANN. STAT. § 650.058(4); 2008 Ut. Ch. 358; VT. STAT. TIT. 13. § 5574; 2004 VA. S.B. 271.

<sup>22</sup> It should be noted that authorizing the Claims Board to award attorney’s fees and other costs associated with the proceeding will not drain the state’s resources. The vast majority of exonerees initially received representation by a state public defender due to their indigence; thus, reimbursement for attorney’s fees will be minimal.

Wisconsin's statute currently authorizes the Claims Board to award attorney fees,<sup>24</sup> but it is unclear in the statutory language whether the wrongfully convicted individual can receive reimbursement for all attorney fees incurred throughout the proceedings related to the conviction and charge, including postconviction relief. In fact, one member of the Claims Board, presently alone in this minority view, believes that attorney's fees are not to be awarded in excess of the miniscule \$25,000 cap—that instead the fees are included in that award.<sup>25</sup> Thus, the statute should be amended to remove any ambiguity.

In addition to awarding attorney fees, Wisconsin should also go beyond what other states offer, and reimburse exonerees for all fees associated with the wrongful conviction. These fees include, but are not limited to, the court costs associated with the trial and any postconviction relief, work release fees, any penalty or jail surcharges assessed by the court, public defender fees, fees paid to the victim-witness compensation fund, fees paid for court-ordered restitution, fees assessed under the crime law and drug law enforcement surcharge, and fees paid for DNA analysis.<sup>26</sup> Securing the return of these fees paid to the state is notoriously difficult. There is no statutorily defined process and, as a result, the wrongfully convicted individual must not only calculate all of the fees paid, but must individually petition each institutional entity for a refund.

In one recent case involving a former Wisconsin Innocence Project client, these fees totaled at least \$2,225, yet securing their partial return required numerous letters and discussions with administrators. David Sanders would have also received this amount or more, providing him with at least some financial relief upon his release. But because there is no clear right or process for the return of such fees, Sanders never received a refund of those sums.

Providing for the automatic return of these fees as part of a compensation award relieves the wrongfully convicted individual from undergoing this burdensome process on his or her own. Moreover, returning these fees will not amount to a huge imposition on the state's budget because the number of individuals who would qualify for these fees costs is small.<sup>27</sup>

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<sup>23</sup> 705 ILL. COMP. STAT. 505/8; IOWA CODE § 663A.1; N.J. STAT. ANN. § 52:4C-1; OHIO REV. CODE ANN. § 2743.49; TEX. CODE ANN. § 103.001; VT. STAT. TIT. 13. § 5574 (2007).

<sup>24</sup> The statute currently states, "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." WIS. STAT. § 775.03(4).

<sup>25</sup> David Sanders Claims Board Decision (Hunter, dissenting), Jan. 24, 2008, *available at* <http://claimsboard.wi.gov/docview.asp?docid=13153&locid=28>.

<sup>26</sup> Wis. Stat. Chapter 814 sets out the court costs and fees that can be levied against defendants. The Wisconsin Circuit Court has created a useful guide to the statutory fines, *available at* <http://www.wicourts.gov/about/filing/docs/fees.pdf>. The table lists the relevant statute for each potential fee, notes the percentage or amount that can be assessed, and describes the circumstances in which the fee applies.

<sup>27</sup> Unfortunately, we do not have the data for the number of individuals in Wisconsin who would benefit from this statutory change. We do not anticipate, however, that the numbers would be particularly large because it is extremely rare for a conviction to be overturned or vacated. The courts have a strong interest in finality, and reverse convictions very infrequently. *See, e.g., State v. Escalona-Naranjo*, 185 Wis. 2d 169, 517 N.W.2d 157 (1994) (discussing the state's interest in the finality of convictions). As a measure of the infrequency of reversal, the

*C. The compensation statute should provide essential non-monetary compensation to the wrongfully convicted.*

Ironically and inexcusably, Wisconsin provides more support to guilty individuals after release than to exonerated wrongfully convicted individuals. Wisconsin should follow the lead of other states and the national trend toward offering the wrongly convicted healthcare and counseling services, assistance finding housing, and educational and vocational support, to ensure that they have been provided ample opportunities for successful reintegration into society.

First, the exoneree's county of residence should provide an up-to-date list or directory of resources in the community that are likely to be available the day he or she leaves prison. This list may include information about temporary housing and emergency shelters, food banks, healthcare services, etc. Second, the county should provide a case manager to the exoneree to identify and administer the services of the county. The case manager should provide one-on-one assistance to help the exoneree obtain food and clothing, secure long-term housing, and access job training and job placement services. The case manager should assist with applying for any benefit programs the individual may be eligible for, such as FoodShare and BadgerCare. If needed, the case manager also should connect the individual to community or faith-based organizations that provide mentoring opportunities and other supports.

Currently, Wisconsin's compensation statute does not offer non-monetary support to the wrongfully convicted. But other states recognize and address the fact that exonerees need more than just monetary compensation. For example, Texas provides one year of counseling services to each wrongfully convicted individual.<sup>28</sup> Louisiana compensates exonerees by providing three years of medical and counseling services.<sup>29</sup> Vermont's statute surpasses both by giving exonerees ten years of state health care coverage.<sup>30</sup>

Other states offer the wrongfully convicted access to education. Florida and Texas offer a waiver for 120 hours of instruction at any career center, community college, or state university, while Massachusetts offers a fifty percent tuition discount at community colleges and universities.<sup>31</sup> In Virginia, exonerees are reimbursed up to \$10,000 of tuition for career and technical training within the state community college system, contingent upon successful completion of the program.<sup>32</sup> Louisiana's compensation statute even covers the tuition and fees at any community college or public university in the state and the cost of one year of job-skills training for exonerees.<sup>33</sup>

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Wisconsin Innocence Project has only seen 12 Wisconsin clients' convictions reversed or vacated in the last 12 years.

<sup>28</sup> TEX. CODE ANN. § 103.001

<sup>29</sup> LA. REV. STAT. § 15:572.8.

<sup>30</sup> VT. STAT. TIT. 13. § 5574.

<sup>31</sup> FL. H.B. 1025; H.B. 1736, 81st Leg., Sess. 81-R (Tex. 2009); MASS. GEN. LAWS. CH. 258 § 5.

<sup>32</sup> 2004 Va. Ch. 818.

Wisconsin should provide similar support for exonerees. At the very least, Wisconsin should provide the wrongfully convicted with the same services available to parolees and people on extended supervision. These services should include, but not be limited to, employment assistance, housing assistance, counseling services, and other such services. Offering these services will not overburden the state because the number of individuals who would qualify for these additional services will be small, and because the infrastructure already exists to provide these services.

*D. Wisconsin should provide a mechanism that allows wrongfully convicted individuals to expunge their criminal records.*

Given that a criminal record drastically affects access to housing and employment,<sup>34</sup> Wisconsin's current law is inadequate because it does not provide any mechanism for expunging the records of those who were wrongfully convicted. In Wisconsin, only a person under age 21 who was found guilty of a misdemeanor is eligible for record expunction.<sup>35</sup> The current statute does not provide for expunction in cases of municipal ordinance violations, state civil forfeitures, or felonies. Even if an individual is judged innocent by both a judge and a prosecutor, and proves his innocence by clear and convincing evidence in the Claims Board, that individual has no statutorily prescribed way to expunge the criminal record.

The inability to expunge a criminal record is especially unfair to the wrongfully convicted, whose involuntary contact with the criminal justice system continues to harm their lives long after the exoneration. In fact, studies indicate that mere contact with the criminal justice system severely limits subsequent employment opportunities. According to one recent study conducted in Milwaukee, individuals who have a criminal record are only one-half to one-third as likely as otherwise identically qualified individuals to be considered for employment.<sup>36</sup> A criminal record not only limits where an exoneree can find employment, it also severely limits where he may hang his hat. In most Wisconsin communities, private landlords are given broad discretion to discriminate against those with criminal records so long as their policy is consistent and not based on other prohibited factors such as race or religion.<sup>37</sup>

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<sup>33</sup> LA. REV. STAT. § 15:572.9.

<sup>34</sup> See Catherine Anderson, Am. Bar Ass'n Section of Criminal Justice, Report to the House of Delegates, Feb. 2005, at 9, available at <http://www.abanet.org/crimjust/policy/my05108a.pdf>.

<sup>35</sup> WIS. STAT. § 973.015 (2008).

<sup>36</sup> Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937 (2003), available at <http://www.northwestern.edu/ipr/publications/papers/2003/pagerajs.pdf>. Exonerees are unique in that their criminal records do indicate that their convictions have been vacated or reversed. Unfortunately, many employers do not understand the information on CCAP, or continue to view the individual negatively despite the presumption of innocence, as occurred when Evan Zimmerman sought the janitorial position. Moreover, as noted below, data sold to private vendors, which employers use to conduct background checks, often do not have updated information.

<sup>37</sup> No Second Chance: People with Criminal Records Denied Access to Public Housing, HUMAN RIGHTS WATCH, 2004 at 11, available at <http://www.hrw.org/reports/2004/usa1104/usa1104.pdf>.

These problems are magnified by the development of Wisconsin's Circuit Court Access web site, the Consolidated Court Automation Programs (CCAP), which is available to anyone with access to the Internet. As the Supreme Court Office of Operations has noted, "[a]utomated records no longer have the 'practical obscurity' that insulates paper records, where the difficulty of use creates greater effective privacy."<sup>38</sup> As a result, the consequences of a criminal record continue to haunt innocent individuals.

Moreover, the rise of private data vendors who sell credit and background reports to employers and the general public has meant that merely sealing the record or removing it from CCAP does not fully expunge the record. These vendors sell records across state lines, and yet no law requires private vendors to update conviction information.<sup>39</sup> As a result, convictions that have been reversed or vacated, and even expunged, continue to appear in background checks conducted by employers through these third-party vendors, further harming the wrongfully convicted.

Recognizing these barriers that exonerees face and the problems created by electronic record-keeping, many states have begun reforming their expungement laws, providing automatic sealing of court records for those whose convictions are overturned.<sup>40</sup> In addition, some states now "immunize" exonerees who do not disclose their past convictions from employment discrimination based on failure to disclose their wrongful convictions.<sup>41</sup> Finally, some states have authorized the court to issue a certificate of innocence, either at the time of reversal<sup>42</sup> or after filing a petition to the court,<sup>43</sup> allowing the wrongfully convicted individual to mitigate the effects of out-of-date records on file with private data vendors.

Wisconsin should provide an efficient mechanism to help exonerees achieve expungement of their criminal records. First, individuals whose convictions are reversed or vacated on grounds not inconsistent with innocence should have their corresponding court record immediately removed from the Wisconsin Circuit Court Access website (CCAP). Currently, legislation is pending in the Wisconsin State Assembly that prevents the entry of a criminal charge into CCAP until there is a finding of guilt in a criminal matter.<sup>44</sup> Automatic CCAP removal for an exoneree is consistent with but much narrower than the proposed legislation.

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<sup>38</sup> Supreme Court Memorandum, Sealing & Expunging, at 6 (June 9, 2005) (citing *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)).

<sup>39</sup> See Jessica R. Lonergan, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 437-39 (2007-08).

<sup>40</sup> See Mass. Gen. Laws Ann. Ch. 258D, § 7(A) (West Supp. 2007); MO. ANN. STAT. § 650.058(4) (West Supp. 2007).

<sup>41</sup> See, e.g., MO. ANN. STAT. § 650.058(4) (West Supp. 2007).

<sup>42</sup> See Karen Sloan, *Ill. Law School Poised to Help Wrongly Convicted on a Shorter Path to Pardon, Compensation*, NAT'L L.J., OCT. 15, 2008, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425268194>.

<sup>43</sup> *Id.*

<sup>44</sup> Assem. B, 340 (Wis. 2009)

Second, Wisconsin should mandate the expungement of exonerees' criminal records when the individual successfully petitions for compensation. As opposed to the superficial removal of a conviction from CCAP, expungement requires the physical court documents pertaining to the exoneree's case sealed or destroyed. The authority to issue an expungement order should be included within the compensation proceedings, so that when the individual is awarded compensation through the state's process, he does not have to undergo an additional step in seeking to expunge the record. Should exonerated individuals choose not to seek compensation under Wis. Stat. § 775.05, they should still be eligible for expungement by motion to the circuit court.

**II. To aid with the difficult transition period between the reversal of conviction and complete compensation, Wisconsin should provide immediate compensation to all individuals whose convictions are reversed or vacated on grounds not inconsistent with innocence by immediately providing necessary support services, ordering the return of all fines, costs, and surcharges imposed, and providing immediate transitional monetary assistance.**

Wisconsin should provide individuals who are more likely than not innocent with a monetary award even before they petition the Claims Board for compensation so that they can receive necessary immediate assistance upon their release from custody after a reversal of conviction. The current Wisconsin statute fails to offer wrongfully convicted individuals any immediate assistance in the interim period between reversal of the conviction and the State Claims Board compensation hearing. Although those who can prove their innocence may eventually qualify for monetary compensation, the compensation does not come at a time when they need it most. Nor does it provide for those who cannot prove innocence by clear and convincing evidence.<sup>45</sup> David Sanders, for example, did not receive compensation until over six months after he filed his compensation claim—years after his conviction was vacated—forcing him to file for bankruptcy.

To begin, all individuals whose convictions are reversed or vacated on grounds not inconsistent with innocence should also immediately receive all services provided to parolees and people on Extended Supervision. As discussed previously, non-monetary services such as counseling, healthcare, and housing assistance can be as important, if not more so, as monetary assistance. In addition, the law should provide that, upon reversal of conviction, all fines, fees, costs, and surcharges imposed as a result of the conviction should be automatically and promptly returned to the defendants.

As an additional intermediate measure, Wisconsin's statute should provide transitional assistance to wrongfully convicted individuals at the time of reversal. If the court were to find, at the time the conviction was vacated, that it is more likely than not that the defendant is innocent, or if the state were to stipulate to an individual's innocence, then the individual should promptly receive monetary compensation. At this intermediate stage, the court would make the determination, and then issue the interim transitional grant *within ten business days*. It is

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<sup>45</sup> WIS. STAT. § 775.03(3).

important that since this is a discretionary finding by the judge, with little fact-finding involved, the resulting decision to grant or withhold immediate monetary compensation should not enter into the later decision to award or deny full compensation. However, the final compensation amount, once awarded, can be offset by any transitional assistance received.

Other states authorize the court to award immediate compensation. For example, Virginia statutorily implemented an immediate compensation scheme whereby those wrongfully convicted of a felony are provided an immediate monetary stipend or “transition assistance grant of \$15,000” when their convictions are reversed or vacated.<sup>46</sup> This award is then deducted from any additional award later received.<sup>47</sup> Illinois, which recently revised its compensation statute, authorizes the court to issue a certificate of innocence upon a showing of a preponderance of evidence that the defendant is innocent, which enables wrongfully convicted individuals to obtain speedy compensation at the discretion of the court.<sup>48</sup>

Providing these services as well as transitional monetary compensation will not be a windfall for two reasons. First, only those individuals whose convictions are reversed or vacated on grounds not inconsistent with innocence will receive compensation. This is unlikely to be a significant number of individuals. Second, if the prosecutor decides to retry the individual, and the individual is re-convicted, the fines, costs, fees and surcharges can be reimposed and the transitional assistance provided to the individual can be ordered repaid. As a result, guilty individuals will not reap a windfall from this specific form of compensation.

### **III. The compensation procedure and burden of proof imposed by the current statute should be improved.**

*A. Wisconsin should adopt a preponderance of the evidence burden of proof for those seeking compensation, which is consistent with the standard required for other civil claims, and should allow compensation for individuals who were pressured to confess falsely or plead guilty or no contest to crimes they did not commit.*

In all other civil claims brought before the state Claims Board, and in most other civil cases involving compensation and damages, the plaintiff or claimant is only required to prove his or her claim by a preponderance of the evidence.<sup>49</sup> Wisconsin should adopt this standard for compensation claims filed by the wrongfully convicted. There is no reason to treat wrongly imprisoned individuals any differently than any other kind of wronged or injured party.

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<sup>46</sup> 2004 Va. Ch. 818; 2004 Va. SB 271. This money comes from the state’s criminal fund.

<sup>47</sup> *Id.*

<sup>48</sup> 705 ILL. COMP. STAT. 505/8 (2008). In Illinois, the decision to authorize judges to issue a certificate of innocence recognizes that judges are often already familiar with the facts of the case and can make an immediate determination. See Karen Sloan, *Ill. Law School Poised to Help Wrongly Convicted on a Short Path to Pardon, Compensation*, NAT’L L.J., Oct. 15, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425268194>.

<sup>49</sup> See WIS. STAT. § 16.007(5) (indicating that the Claims Board should use the legal standard for the type of civil legal claim asserted, which is always a preponderance standard).

Wisconsin currently requires the Claims Board to determine that the individual is innocent by clear and convincing evidence.<sup>50</sup> By employing a higher standard for a compensation claim, which is essentially a civil claim,<sup>51</sup> Wisconsin penalizes the wrongly convicted and unfairly makes it harder for them to receive compensation. Requiring an individual to prove his or her innocence by clear and convincing evidence means that many innocent individuals will not receive compensation for their wrongful imprisonment. In the absence of DNA verification, an innocent individual may not be able to conclusively prove innocence. This includes circumstances when a witness in the original trial recants his or her trial testimony, when the conviction was based on faulty forensic science, or when an eyewitness admits an error in identification.<sup>52</sup> Requiring an individual to prove innocence by clear and convincing evidence severely and unfairly restricts innocent individuals from receiving full compensation.

Furthermore, Wisconsin law should be amended to permit innocent individuals who were pressured to confess falsely or enter a guilty or no contest plea to obtain compensation. Wisconsin's statute currently renders an individual ineligible for compensation if he or she contributed in any way to his or her wrongful conviction.<sup>53</sup> This means that innocent individuals who falsely confess for any reason, even police coercion, are ineligible to receive compensation under the current statute. Innocent individuals who pled guilty under duress or in order to avoid a more serious charge and sentence would also be ineligible under the current law. Under the current statute, someone like Chris Ochoa, a Texas exoneree represented by the Wisconsin Innocence Project who falsely confessed and pled guilty to a heinous crime under police coercion, would be denied compensation despite being proven innocent of the crime for which he served 12 years in prison, after DNA testing identified the true perpetrator. Given that false confessions may result from coercive police interrogations, including lies and threats as in Ochoa's case, excluding these individuals from receiving compensation is particularly unfair. Ochoa is not alone in falsely confessing: false confessions have been identified in at least fifteen percent of wrongful convictions, meaning Wisconsin's statute effectively excludes at least fifteen percent of exonerees.<sup>54</sup>

*B. Wisconsin should improve the procedure for filing a compensation claim.*

Wisconsin should improve the process for receiving compensation to ease the burden on the wrongfully convicted. The Claims Board's practices also contribute to the long wait for receiving compensation. When a wrongfully convicted individual has filed another lawsuit

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<sup>50</sup> WIS. STAT. § 775.05(3).

<sup>51</sup> *Walden*, 547 N.E.2d at 967.

<sup>52</sup> Mistaken eyewitness identification has been noted in 79% of wrongful convictions, faulty forensic science was used in 59% of wrongful convictions, and false informant testimony occurred in 18% of wrongful convictions. Brandon L. Garrett, *Judging Innocence*, 108 COLUMBIA L. R. 55, 60 (2008).

<sup>53</sup> WIS. STAT. § 775.05(4).

<sup>54</sup> This estimation assumes that Wisconsin's numbers compare to the nation's. Garrett, *supra* note 53, at 88.

against any entity, the Claims Board often will not consider a compensation claim until all other lawsuits have been settled, even though this requirement is not in the statute. Such a delay might make some sense if applied when a wrongfully convicted individual was suing the state and the statute allowed the Claims Board to deduct damages awarded by the court from damages to be awarded by the Board. But the Claims Board has delayed a decision even where an individual was suing his former attorney, an individual completely unassociated with the state.<sup>55</sup> In addition, the current statute does not authorize the Claims Board to reduce compensation based on damages awarded in civil suits, so this delay does not make sense. Moreover, while the statute does not delineate a prosecutor's right to file a response to a Claims Board petition, in at least one case the Claims Board repeatedly delayed hearing a claim because it was waiting for the prosecution's response.<sup>56</sup> These practices add to the delays innocent people experience before they receive compensation. Four reforms should be adopted to redress these problems.

First, Wisconsin should facilitate the claims process by authorizing individuals seeking compensation to receive a public defender to assist them. This option should become available to the wrongfully convicted individual immediately after the individual's conviction is vacated or reversed, assuming the individual is not already privately represented. Having access to an attorney would greatly assist the wrongfully convicted in seeking the full compensation to which they are entitled.

Second, claims should ultimately be heard and decided before an Administrative Law Judge (ALJ) before the Division of Hearings and Appeals (DHA). Exonerees should still file a claim for compensation with the Claims Board. This claim should then immediately be forwarded by the administrative staff of the Claims Board to the Department of Administration-Division of Hearings and Appeals, utilizing the same procedure as the Division utilizes for hearings under the crime victim compensation program (Wis. Stat. § 949.11).<sup>57</sup> ALJ's already hold hearings on a regular basis for victim compensation as well as other government agency disputes. The Claims Board, by contrast, only meets several times a year. Therefore, the ALJ's are best suited for promptly determining compensation. It is our understanding that when fact-finding is necessary in certain cases, it is already the current practice to transfer cases from the Claims Board to administrative law judges. Therefore, this proposed process will not unduly burden the current system as the process already exists for other civil claims.

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<sup>55</sup> Exoneree Frederic Saecker experienced a two-year delay while waiting for the completion of his suit against his trial attorney, as did Anthony Hicks, whose innocence was proved through DNA testing. See Shelley Fite, *Compensation for the Unjustly Imprisoned: A Model for Reform in Wisconsin*, 2005 WIS. L. REV. 1181, 1196-97 (2005).

<sup>56</sup> The prosecutor's failure to file a reply contributed to the delay in David Sanders's claim. See Dee J. Hall, *Aid Asked for Wrongfully Jailed Man; Compensation and Legals [sic] Fees Totaling \$23,000 Requested for Freed Teacher*, WIS. ST. J., Jan. 25, 2008.

<sup>57</sup> It is recognized that Wisconsin needs to implement many statutory changes to complete the compensation reform outlined in this proposal. Although Appendix C does not encompass all statutory changes, it reflects on some of the specific statutory changes needed to streamline compensation through the DHA. See *Appendix C*.

Third, to further ensure timely response, the Claims Board should not have the authority to delay sending claims to the DHA when another suit against the state, county, or municipality, is pending.<sup>58</sup> Instead, if a subsequent civil judgment is obtained, the state can be permitted to offset or recoup any compensation awarded through DHA, against the civil judgment. This provision renders a delay unnecessary.

Fourth, the ALJ should determine whether the claimant has proved his or her innocence by a preponderance of the evidence, and the amount of compensation he or she should be awarded. The ALJ should then inform the Claims Board of the claimant's ultimate award, which will be responsible for prompt disbursement of the award.

#### **IV. The fiscal impact associated with an increase in compensation is minimal.**

Although granting a transitional award at the time of conviction reversal and lowering the standard of proof to allow for the wrongfully convicted to receive compensation will have some budgetary impact, it is unlikely that it will have a significant impact because the number of exonerations is small. While there is no precise data on the number of individuals who would be eligible to receive compensation, data from the Wisconsin Innocence Project suggests that the numbers are low. In 12 years, the Wisconsin Innocence Project has obtained reversal of convictions for 12 individuals in Wisconsin.<sup>59</sup> Although the Wisconsin Innocence Project is not the only group representing innocent and wrongly convicted individuals in this state, this data suggests that, on average, perhaps one or two people a year would likely qualify for transitional assistance and compensation. Moreover, only ten individuals have actually received compensation from the Claims Board since 1966, and only thirty-three individuals have even applied for compensation in the last forty years. Even though the numbers may increase slightly since the preponderance standard is easier to meet than the current standard, it is unlikely that these numbers will increase significantly. As a result, it is unlikely that revising the statute to provide more adequate compensation for the wrongfully convicted will have any significant impact on the state's budget.

#### **CONCLUSION**

Legislatures around the country have recognized that states have a moral and practical obligation to compensate exonerees for unjustly denying their freedom and inflicting severe hardships. While Wisconsin was the first state to pass a compensation statute, Wisconsin has fallen behind in "making it right" for the wrongfully convicted. Wisconsin's current statute does not satisfactorily compensate the wrongfully convicted for their ordeal. Wisconsin must revise its statute to adequately compensate the wrongfully convicted and reestablish itself as a forerunner or at least an equal in compensating the wrongfully convicted.

To rectify the severe shortcomings of the current compensation system, Wisconsin should increase compensation amounts for those wrongfully convicted, authorize compensation for attorney's fees and other fees related to the wrongful conviction, offer non-monetary compensation in the form of support services, allow for the wrongfully convicted to get their

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<sup>59</sup> In that time period the Wisconsin Innocence Project has also helped free two individuals in other states.

criminal records related to the wrongful convicted expunged, and streamline the compensation claim process.

To aid with the difficult transitional period between the reversal of conviction and complete compensation, Wisconsin should provide immediate compensation to all individuals whose convictions are reversed or vacated on grounds not inconsistent with innocence by immediately offering necessary support services and providing transitional monetary assistance.

Enacting these improvements to the current Wisconsin statute will not only serve to adequately compensate the wrongfully convicted, but will restore Wisconsin's position as a leader on issues of fairness and justice in the criminal justice system.

## APPENDIX A

Wis. Stat. § 775.05 (2007)

775.05. Compensation for innocent convicts.

(1) The claims board shall hear petitions for the relief of innocent persons who have been convicted of a crime.

(2) Any person who is imprisoned as the result of his or her conviction for a crime in any court of this state, of which crime the person claims to be innocent, and who is released from imprisonment for that crime after March 13, 1980, may petition the claims board for compensation for such imprisonment. Upon receipt of the petition, the claims board shall transmit a copy thereof to the prosecutor who prosecuted the petitioner and the judge who sentenced the petitioner for the conviction which is the subject of the claim, or their successors in office, for the information of these persons.

(3) After hearing the evidence on the petition, the claims board shall find either that the evidence is clear and convincing that the petitioner was innocent of the crime for which he or she suffered imprisonment, or that the evidence is not clear and convincing that he or she was innocent.

(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).

(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 shall be subject to review as provided in ch. 227,

## APPENDIX B

Yearly Compensation for the Wrongfully Convicted	
State	Compensation Per Year
Texas	\$80,000
Utah	\$55,974 <sup>1</sup>
Virginia	\$51,911 <sup>2</sup>
Alabama	\$50,000
Florida	\$50,000
Mississippi	\$50,000
North Carolina	\$50,000
Federal	\$50,000 <sup>3</sup>
Ohio	\$40,330 <sup>4</sup>
California	\$36,500
Vermont	\$30,000
Nebraska	\$25,000
Iowa	\$50 per day + \$25,000 for lost wages
New Jersey	\$20,000
Missouri	\$18,250
Illinois	\$14,000 - \$17,070 <sup>5</sup>
Louisiana	\$15,000
<b>Wisconsin</b>	<b>\$5,000</b>

<sup>1</sup>Estimate based on the U.S. Census Bureau's 3-year average median income. Utah awards wrongfully convicted individuals the average annual nonagricultural payroll wage for each year of incarceration.

<sup>2</sup>Estimate based on the U.S. Census Bureau's 3-year average median income. Virginia awards wrongfully convicted individuals 90% of the state per capita personal income.

<sup>3</sup>Death row cases are awarded \$100,000 per year

<sup>4</sup>In addition to \$40,330 for each year in prison, Ohio also awards lost wages, attorney fees, fines and court costs

<sup>5</sup>Compensation determined by length of confinement. For example, individuals confined for 5 years or less are awarded up to \$85,350, and individuals confined for 14 years or more are awarded up to \$199,150.

Total Compensation for the Wrongfully Convicted	
State	Total Compensation
Connecticut	No Limit
District of Columbia	No Limit
Maryland	No Limit
New York	No Limit
West Virginia	No Limit
California	No Limit
Missouri	No Limit
Florida	\$2 million
Virginia	\$1.1 million <sup>1</sup>
Tennessee	\$1 million
Utah	\$839,610 <sup>2</sup>
North Carolina	\$750,000
Massachusetts	\$500,000
Mississippi	\$500,000
Nebraska	\$500,000
Maine	\$300,000
Illinois	\$199,150 <sup>3</sup>
Oklahoma	\$175,000
Louisiana	\$150,000
<b>Wisconsin</b>	<b>\$25,000</b>
New Hampshire	\$20,000

<sup>1</sup>Virginia awards wrongfully convicted individuals 90% of the state per capita personal income for up to 20 years.

<sup>2</sup>Utah awards wrongfully convicted individuals the average annual nonagricultural payroll wage for each year of incarceration for up to 15 years.

<sup>3</sup>Compensation determined by length of confinement.

## APPENDIX C

Currently, the chapter that governs Administrative Actions, such as those heard by the Division of Hearings and Appeals, does *not* apply to proceedings of the Claims Board except where a claims applicant wants a decision by the claim's board reviewed, in which case the review is subject to the procedures of Administrative Actions under Chapter 227. (Wis. Stat. § 227.03(5)). Therefore, the following statutes would need to be amended:

- Wis. Stat. § 227.03(5): Should be changed so that the procedures of Chapter 227 do apply to the Compensation for Innocent Convicts statute, §775.05.
- Wis. Stat. § 775.95: The following changes should be made
  - (1) The claims board shall receive petitions for relief of innocent persons who have been convicted of a crime, and the Board itself or its administrative staff shall forward claims to the Division of Hearing and Appeals;
  - (2) A time limit for both the transmittal of the claim to the other parties and for the other parties to respond should be set;
  - (3) A Division of Hearings and Appeals Department of Justice Administrative Law Judge shall hear the evidence on the petition within an allotted time period, and should use a preponderance of the evidence standard of proof (not clear and convincing evidence);
  - (4) If the DHA Dept. of Justice ALJ finds the petitioner is innocent, regardless of whether he/she by his/her own act or failure to act contributed to bringing about the conviction and imprisonment, the ALJ shall submit such a finding and a recommendation for compensation to the claims board.
  - (5) The ALJ should keep a complete record of the proceedings in accordance with the other requirements for Chapter 227 to provide an opportunity for the findings and away of the ALJ and Claims Board to be subject to review as provided in Chapter 227.