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SUPREME COURT

**STATE OF WISCONSIN
SUPREME COURT**

Derrick A. Sanders,

Petitioner-Appellant,

Appeal No. 2021-AP-373

v.

State of Wisconsin Claims Board,

Respondent-Respondent-Petitioner.

Dane County Case No. 2020-CV-1016
Hon. Stephen E. Ehlke, presiding

RESPONSE TO PETITION FOR REVIEW

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ARGUMENT

This Court need not review an unpublished Court of Appeals opinion that requires the State of Wisconsin Claims Board only to determine, one way or the other, whether \$25,000 will be adequate to equitably compensate Derrick Sanders for the 26 years he spent in prison for a crime he did not commit.

The Court of Appeals' holding is not only sound, but also both narrow and of no bearing outside extraordinary cases like Sanders'. The Court of Appeals construed and applied a specialized statute, Wis. Stat. § 775.05(4), used only by the Claims Board and only when the Board determines how much to compensate a person wrongly convicted of a crime. In doing so, it faithfully applied this Court's precedent requiring that statutory text be interpreted in context, as parts of a whole. The Court of Appeals instructed the Claims Board to do no more than exercise its discretion under § 775.05(4). It did not suggest what conclusion the Board should reach. And any impact of its narrow holding will be cabined to the few cases where, as here, the Claims Board finds that Wisconsin has wrongly convicted and incarcerated an innocent person. The Court's law-developing function cannot be served by further prolonging Sanders' case. Review should be denied.

I. Brief Background

The Claims Board found by clear and convincing evidence that Derrick Sanders is innocent of the crime that Wisconsin convicted him of and for which it incarcerated him 26 years. R.7:58–59, Pet.-App. 134–35. The Board also found that Sanders did not contribute to bringing about his conviction. R.7:59, Pet.-App. 135.

Having found Sanders innocent, the Board turned to his compensation. The statute governing this determination reads:

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).

Wis. Stat. § 775.05(4) (emphasis added).

Sanders endured more time in prison than any other person whom the Claims Board has found innocent, according to its 60-plus year precedent log. Only one other such exoneree also lost two decades of freedom: Robert Lee Stinson, who was incarcerated 23 years. R.5:102–103. In 2010, the Claims Board found that \$115,000—\$5,000 for each year of incarceration—was needed to equitably compensate Stinson. *Id.* The Board awarded Stinson the \$25,000 that it may pay under § 775.05(4) and recommended that the legislature award the remaining \$90,000. *Id.*

In Sanders’ case, however, the Board simply awarded the \$25,000 that lies within its power, without accompanying discussion. R. 7:59, Pet.-App. 135. The Board’s decision does not state that the \$25,000 will be adequate to equitably compensate Sanders. *Id.* Nor does it explain the rationale for any such unstated finding. Regarding the amount of Sanders’ compensation, the Board wrote only: “Accordingly, the Board further concludes that compensation in the amount of \$25,000 shall be awarded from the Claims Board appropriation.” R. 7:59, Pet.-App. 135.

Sanders petitioned for rehearing, and one of the Board's five members responded by letter. R.8:3–4, Pet.-App. 128–29. That letter, like the Board's decision, does not state whether \$25,000 is adequate to equitably compensate Sanders, nor explain the basis of any such finding. *Id.*

On review, the circuit court affirmed, but the Court of Appeals reversed and remanded. It instructed the Claims Board “to exercise its discretion as to whether \$25,000 is or is not adequate compensation” for Sanders. *Sanders v. Claims Bd.*, unpublished slip op. ¶ 1, No. 2021AP373, 2022 WL 2070388 (Wis. App. June 9, 2022). It later ordered its opinion unpublished. *See* July 27, 2022 Opinion Ordered Unpublished – Order.

II. The Petition Does Not Meet the Criteria for Review.

A. The Claims Board misstates the issue presented.

Contrary to the petition, this case does not present the question whether Section 775.05(4) “require[s] the Claims Board to offer an affirmative exercise of discretion as to why it did not submit a report to the Legislature regarding additional compensation.” Pet. at 3. Nothing in the Court of Appeals’ opinion requires the Claims Board to explain “why it did not submit a report to the Legislature.” The Court of Appeals instructed the Board “to exercise its discretion as to whether \$25,000 is or is not adequate compensation.” *Sanders*, 2022 WL 2070388, ¶ 1. The Board’s mischaracterization of that holding “bear[s] on the question of what issues properly would be before the court if the petition were granted.” Wis. Stat. § (Rule) 809.62(3)(c).

B. The Court of Appeals applied this Court's precedent to correctly construe plain statutory text.

The Court of Appeals did not resolve any novel issues in its unpublished opinion. It applied settled law requiring that statutory text be interpreted in context, and that reasoning be furnished in support of judicially reviewable discretionary determinations. *Sanders*, 2022 WL 2070388, ¶¶ 20–21, 26–30. The Claims Board asks this Court only to review the Court of Appeals' application of that precedent for error—which is not this Court's function. *See Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997) (the “court of appeals . . . primary function is error correcting,” while “the supreme court's primary function is that of law defining and law development”).

The Court of Appeals applied this Court's precedent by construing Section § 775.05(4)'s component sentences as parts of a whole, not in artificial isolation. *See Sanders*, 2022 WL 2070388, ¶¶ 21, 26–30; *Brey v. State Farm Mut. Automobile Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 (“ascertaining the plain meaning of a statute requires more than focusing on a single sentence or portion thereof” (internal quotation marks omitted)); *id.* ¶ 13 (it is error for a court to interpret “words in isolation” while “declining to address statutory context”); *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (“statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole”). Read together, Section 755.05(4)'s first and last sentences make clear that the Claims Board must determine whether the \$25,000 it awarded Sanders is adequate to equitably compensate him. *See Sanders*, 2022 WL 2070388, ¶¶ 28–29.

Section 755.05(4)'s first sentence directs the Board to “find the amount which will equitably compensate [Sanders], not to exceed

\$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment.” Wis. Stat. § 775.05(4). The Board cannot make this finding without determining whether the amount it awarded will, or will not, be adequate to equitably compensate Sanders. Regardless of whether the Board awards the statutory maximum or something less, no amount can be “*the* amount” that will equitably compensate an exoneree if it is not adequate to serve that purpose.

Section 775.05(4)’s final sentence confirms this. The legislature recognized that in making the determination required by Section 775.05(4)’s first sentence, the Board may find “that the amount it is able to award is not an adequate compensation.” *Id.* That language would make little sense were the Board not tasked with determining *whether* the amount it may award is adequate. The legislature would not expect the Board to answer a question it did not expect the Board to ask.

The Claims Board is wrong in suggesting that the Court of Appeals “read out” the word “if” that begins § 775.05(4)’s last sentence. *See* Pet. at 15. The Court of Appeals expressly *confirmed* that the Claims Board must submit a report to the legislature only “if” it finds that the amount it can award is inadequate. *Sanders*, 2022 WL 2070388, ¶¶ 30, 43. The Court of Appeals instructed the Claims Board only to determine *whether* the amount it awarded is adequate, which it logically must do if there is any possibility of it finding that such amount “is not an adequate compensation.” Wis. Stat. § 775.05(4).

The Board does not deny that if it must determine whether Sanders’ award is adequate, it also must offer reasoning to explain its determination. The Court of Appeals relied on decades-old case law establishing that “discretion is more than a choice between alternatives,”

and that to enable judicial review, a discretionary determination must be evidenced by “the rationale or reason behind the choice.” *Sanders*, 2022 WL 2070388, ¶ 20 (quoting *Reidinger v. Optometry Examining Bd.*, 81 Wis. 2d 292, 297, 260 N.W.2d 270 (1977)); *see also id.*, quoting *Argonaut Ins. Co. v. Lab. and Indus. Rev. Commn.*, 132 Wis. 2d 385, 391, 392 N.W.2d 837 (Ct. App. 1986) (judicial review “is frustrated when . . . the decisionmaker acts without giving the parties or the reviewing court any inkling of the reasons underlying the decision”). The Claims Board does not mention these cases in its petition, let alone argue that the Court of Appeals misapplied them.

Nor does the Board dispute that it provided *no* reasoning to explain the amount it awarded Sanders. *See Sanders*, 2022 WL 2070388, ¶¶ 31–34, 40. The Board did not make even a conclusory finding that \$25,000 will “equitably” compensate Sanders. It stated that “\$25,000 shall be awarded from the Claims Board Appropriation” but did not explain why it chose that amount. R.7:59, Pet.-App. 135. Was it because the Board lacks power to pay any more on its own? Or did the Board make an unrecorded determination that, for reasons not given, \$25,000 truly would suffice as equitable compensation here, despite Sanders’ extraordinary term of imprisonment? The Board explained none of this in its decision, thwarting judicial review.

C. The issue here will have little impact and will not likely recur.

The impact of the decision in this case will be extremely narrow. Section 775.05 applies solely to the Claims Board’s review of petitions by innocent persons convicted of crimes. The Board’s precedent log shows only about fifty such petitions since 1960. *Sanders*, 2022 WL 2070388, ¶ 42; *see also* R.5:75–112 & R.6:1–13 (precedent log for § 775.05 claims).

And this case raised even more particular questions, arising only when the Board finds that a petitioner “was innocent of the crime for which he or she suffered imprisonment,” Wis. Stat. § 775.05(3), *and* awards that petitioner the maximum the Board can pay. The Court of Appeals found that “very few” cases like this have ever occurred. *Sanders*, 2022 WL 2070388, ¶42.

The “very few” cases like *Sanders*’ will not likely present the same issue again. The Court of Appeals directed the Claims Board only to “exercise its discretion as to whether the statutory maximum amount of \$25,000 that it awarded [*Sanders*] is or is not adequate compensation.” *Sanders*, 2022 WL 2070388, ¶ 1. It did not instruct the Claims Board to “set[] a total value, such as a jury would,” nor to “spell out how the Board determined that exact amount.” Pet. at 4 (quoting *Sanders*, 2022 WL 2070388, ¶ 56 (Fitzpatrick, J., dissenting)). Nowhere did it require the Claims Board to explain its determination with exactitude, or in any specific form. It instructed the Claims Board to explain in *some* fashion what it determines adequate as equitable compensation, and why. This imposes no burden on the Claims Board. It is the minimum needed to facilitate meaningful judicial review of the Board’s discretionary determination. So long as the Board performs this minimal task in other, hopefully uncommon cases like *Sanders*’, the issue decided by the Court of Appeals should not recur at all.

CONCLUSION

The Court should deny the Claims Board’s Petition for Review.

Dated this 12th day of September, 2022.

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FORM AND LENGTH CERTIFICATION

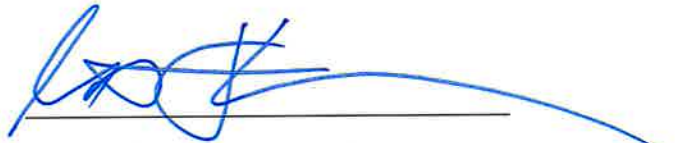
I hereby certify that this Response to Petition for Review conforms to the rules contained in ss. 809.19(8)(b)–(bm) and s. 809.62(4) for a response to a petition for review produced with a proportional serif font. The length of this response, including footnotes, is 2,041 words.



Matthew Splitek

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that the text of the electronic copy of this Response to Petition for Review is identical to the text of the paper copy of the response.



Matthew Splitek