STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP373

DERRICK A. SANDERS,

Petitioner-Appellant,

v.

STATE OF WISCONSIN
CLAIMS BOARD,

Respondent-Respondent-Petitioner.

ON APPEAL FROM A JUDGMENT AFFIRMING THE DECISION OF THE WISCONSIN CLAIMS BOARD, ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

INITIAL BRIEF AND APPENDIX OF RESPONDENT-RESPONDENT-PETITIONER STATE OF WISCONSIN CLAIMS BOARD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case presents a straight-forward statutory-interpretation question that, at base, asks whether the Legislature actually means "if" when it uses the word "if." This Court should hold that it does.

The plain language of Wis. Stat. § 775.05(4) imposes a unique two-step mechanism for the Wisconsin Claims Board to consider requests for compensation for claimants who, pursuant to Wis. Stat. § 775.05(3), prove they were innocent of crimes for which they were imprisoned. The first step of Wis. Stat. § 775.05(4)—not at issue here—requires the Claims Board to determine an award of compensation up to a statutory maximum of $25,000.

The second step is conditional and limited: "*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 legislature." Wis. Stat. § 775.05(4). Put simply, while the Claims Board has neither the discretion nor authority to award compensation above the statutory maximum, *if* it finds the amount it can award inadequate, it can submit a report to the Legislature. The Legislature may decide to pass legislation awarding additional compensation but would have no obligation to act on the Claims Board's report.

Here, the Claims Board awarded Sanders the statutory maximum. It did not find the statutory maximum to be inadequate compensation and therefore did not submit a report to the Legislature. In a split decision, the majority of the court of appeals nevertheless held that the Claims Board failed to properly exercise discretion by not affirmatively explaining why it did *not* submit a report to the Legislature. As Judge Fitzpatrick rightly recognized in dissent, the majority's "untethered" interpretation both ignored words the Legislature did write and added others it did not.

This Court should reverse the majority's problematic interpretation and hold that Wis. Stat. § 775.05(4) does not require the Claims Board to affirmatively address why it has *not* submitted a report to the Legislature regarding additional compensation beyond the maximum the Claims Board is authorized to award.

To avoid further litigation on remand, this Court should also hold that Sanders cannot show prejudice from the Claims Board seeking and obtaining clarification from the District Attorney's Office on its position on Sanders's petition via email. Sanders never developed the merits of this argument below, but the court of appeals majority took up the issue and even advanced a due process argument Sanders never raised. The Claims Board's communications were proper, and Sanders cannot show any prejudice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument and its decision to grant review reflects that publication is warranted.

ISSUES PRESENTED

1. Does Wis. Stat. § 775.05(4) require the Claims Board to affirmatively explain why it has not submitted a report to the Legislature regarding a petitioner's request for additional compensation beyond the statutory maximum the Claims Board can award?

The Claims Board awarded Sanders the statutory maximum and did not expressly address why it was not submitting a report to the Legislature regarding additional compensation. The circuit court affirmed the Claims Board's decision. In a split decision, the court of appeals reversed and remanded, holding that Wis. Stat. § 775.05(4) requires the Claims Board to explain why it does not submit a report to the Legislature regarding additional compensation beyond the statutory maximum.

This Court should answer "no" and reverse the court of appeals.

2. Did the Claims Board engage in improper *ex parte* communication prejudicing Sanders to a material degree by asking the District Attorney's Office for clarification on its position on Sanders's petition?

The Claims Board asked the District Attorney's office for clarification of its position via email. The circuit court affirmed the Claims Board's decision and rejected Sanders's *ex parte* communication argument. In a split decision, the Court of Appeals did not affirmatively decide Sanders's *ex parte* communication argument but suggested the communication may have been improper.

This Court should answer "no."

STATEMENT OF THE CASE

I. Sanders participated in a physical assault of a man but not in his homicide; Sanders was sentenced for homicide in 1993 and the charges were dismissed in 2018.

Sanders's petition for compensation here concerns his homicide conviction following his no contest plea, and the subsequent vacating of that homicide conviction.

Sanders and two other men severely physically assaulted a man at two different houses. (R. 5:31.) After the physical assault, Sanders's co-actors took the man to another location, and one of Sanders's co-actors, Boddie, shot and killed the man. (R. 5:31.)[1]

Sanders pled no contest to first-degree intentional homicide as party to a crime and was sentenced to life in prison in October of 1993. (R. 5:31.) In 1995, the court of appeals vacated his no contest plea, concluding Sanders did not knowingly and intelligently understand the punishments. (R. 5:31.)

Sanders received new counsel and told counsel he was neither aware of nor involved in the shooting. (R. 5:32–33.) Counsel led Sanders to stipulate to re-enter the same no contest plea and receive the same sentence. (R. 5:32.) Sanders stated that he re-entered the plea because he believed he was strictly liable for the homicide. (R. 5:33.) In 1996, Boddie signed an affidavit stating that he alone was responsible for the shooting. (R. 5:33.)

In 2017, Sanders filed another postconviction motion. (R. 5:30.) In August of 2018, the circuit court vacated

[1] The Claims Board cites primarily to the criminal circuit court's fact-findings in its August 2018 decision vacating Sanders's no contest plea in providing this factual background.

Sanders's no contest plea, concluding that the State failed to show any factual basis for his no contest plea or that he entered it knowingly and intelligently with an understanding of party-to-a-crime liability. (R. 5:34–35.)

Police re-interviewed Boddie. He again stated that although Sanders participated in the beating, Sanders was not involved in the shooting. (R. 5:54–59.)

At a hearing in September of 2018, the State moved to dismiss the case against Sanders; the circuit court entered a written order vacating the judgment of conviction and dismissing the case. (R. 5:36–40 (hearing transcript), 41 (signed dismissal order).) By that point, Sanders had served roughly 25 years in prison. (R. 5:31 (sentencing September 7, 1993), 41 (dismissal September 13, 2018).)

II. The Claims Board awarded Sanders the statutory maximum of $25,000 for his imprisonment for homicide.

A. Sanders filed a petition with the Claims Board seeking over $5.7 million in compensation for his imprisonment.

Sanders sought compensation for his imprisonment from the Claims Board under Wis. Stat. § 775.05. A convicted person who can prove his innocence by clear and convincing evidence to the Claims Board may seek up to $25,000 in compensation from the Claims Board. A petitioner may wish to obtain additional compensation but only the Legislature may award additional compensation. The Board is composed of members of the State Assembly and Senate and designees from the Offices of the Governor, Department of Administration, and Department of Justice. Wis. Stat. § 15.105(2).

In his petition to the Claims Board, Sanders sought the statutory maximum of $25,000 and additional compensation

of $5,729,965. (R. 5:6.) As to additional compensation, Sanders explained that he had no prior criminal record and had been honorably discharged from the Navy after serving in Iraq. (R. 5:16.) He explained that he graduated high school in the top 30% of his class and, prior to his arrest, was employed full-time, making $9.25 per hour. (R. 5:16.)

He asserted that his "wrongful confinement" led to over $500,000 in lost wages and property. (R. 5:17.) He stated that his "wrongful conviction and confinement" led to "missed career opportunities"; he asserted he could have had a career making $150,000 to $200,000 per year and multiplied those yearly salaries by 26 years to estimate lost earnings. (R. 5:17.) He did not seek any attorneys' fees. (R. 5:6.)

Sanders further requested the "(waiver) of the States [sic] immunity to file a civil rights lawsuit for injuries, damages, and the wrongful conviction" if the Claims Board or Legislature denied his "claims/request." (R. 5:13.)

B. The Claims Board corresponded with both Sanders and the District Attorney's Office and held a hearing on Sanders's petition.

The Claims Board forwarded Sanders's petition to the Milwaukee County District Attorney's Office. (R. 5:61.) The Board explained: "To ensure that the Claims Board has all the facts and that the state's interests are safeguarded, we are asking that you review the enclosed claim, and recommend an appropriate response to the claim." (R. 5:61.)

The District Attorney's Office provided a letter via email. (R. 5:62–63.) It explained that Sanders's claim was reviewed by the assistant district attorney who handled Sanders's criminal case when it came back to the circuit court the previous year. (R. 5:63.) The letter concluded: "Based upon his review of the facts surrounding the crime and Mr. Sanders' petition for compensation, the Milwaukee District Attorney's Office does not oppose his petition." (R. 5:63.)

The Claims Board provided the District Attorney's Office's letter to Sanders. (R. 5:64.) The Claims Board corresponded with Sanders via email about scheduling a hearing. (R. 5:66–68.) The Claims Board also corresponded with the District Attorney's Office about scheduling the hearing. (R. 5:71.)

At an August 2019 meeting, the Claims Board decided to defer its decision on Sanders's petition to a later date to allow for a hearing at which both Sanders and the District Attorney's Office could answer questions. (R. 6:16.)

Sanders inquired about why an additional hearing was necessary, as the "DA did not oppose [his] claim." (R. 6:27.) The Program and Policy Analyst for the Claims Board, who handled its email correspondences, explained that the Claims Board felt "it need[ed] additional information before deciding [his] claim." (R. 6:27.)

Prior to the hearing, a deputy district attorney informed the Claims Board via email that the District Attorney's Office would not have anyone to send to the hearing. He noted that they had "nothing further to add other than what was stated on the record in open court" by the assistant district attorney "at the time this matter was dismissed." (R. 6:31.)

The Claims Board's Program and Policy Analyst responded via email, asking: "DA Chisholm's April 1, 2019, response to the Claims Board stated that the Milwaukee DA's Office 'does not oppose' Mr. Sanders' petition. To clarify, are you saying that the DA's Office does not oppose payment of $5,754,965 to Mr. Sanders?" (R. 6:31.)

The Chief Deputy District Attorney responded via email, explaining that the previous letter intended to express the District Attorney's Office "general support for Mr. Sanders' petition for compensation." (R. 6:31.) "We originally saw his form that requested the statutory maximum of $25,000, which we support." (R. 6:31.) The email continued:

"Regarding his other claims for damages, which appears to have varied over the course of this process, we are not taking any position on those claims, as we understand the claims board is better situated to make that determination." (R. 6:31.)

The Claims Board held a hearing on Sanders's petition in December of 2019. (R. 7:63–71.) Sanders appeared; the District Attorney's Office did not. (R. 7:64.) Sanders noted that the District Attorney's Office had not opposed his petition and reiterated his innocence on the homicide conviction. (R. 7:64–66.) One of the Claims Board members asked him how he arrived at "the $5 million." (R. 7:66.) Sanders responded that though he "laid out" his "earning potential," he was "not trying to say [he] would have earned $5 million"; rather, he felt that amount was appropriate due to recent awards in other cases. (R. 7:66–67.)

C. The Claims Board awarded Sanders the statutory maximum of $25,000.

The Claims Board issued its final decision awarding compensation to Sanders in February of 2020. (R. 7:56–59, Pet.-App. 128–31.) It noted that the District Attorney's Office did not "oppose Sanders's claim for $25,000, which is the statutory maximum amount" and took "no position on Mr. Sanders's claim for additional damages and believe[d] the Claims Board [was] better suited to make a determination regarding those damages." (R. 7:58, Pet.-App. 130.)

In considering whether clear and convincing evidence established that Sanders was innocent of the crime for which he was imprisoned, the Claims Board concluded that though Sanders participated in the beating prior to the homicide, the evidence reflected he was not involved in the homicide. (R. 7:58, Pet.-App. 130.) It reasoned that while the entry of a no contest plea had in other instances constituted an action contributing to the conviction, evidence here reflected that the

entry of both no contest pleas was "legal error." (R. 7:59, Pet.-App. 131.) The Claims Board found that the evidence was clear and convincing that Sanders was innocent of the homicide charge. (R. 7:59, Pet.-App. 131.)

Regarding compensation, the Claims Board "conclude[d] that compensation in the amount of $25,000 shall be awarded from the Claims Board appropriation § 20.505(4)(d)." (R. 7:59, Pet.-App. 131.) The Claims Board's decision reflected a "5-0" vote. (R. 7:59, Pet.-App. 131.) This was the maximum the Claims Board was authorized to award. Wis. Stat. § 775.05(4).

D. The Claims Board denied Sanders's petition for rehearing.

Sanders filed a petition for rehearing under Wis. Stat. § 227.49(3). (R. 7:68–71.) He argued that the Claims Board made (1) a "material error of fact" in concluding that the District Attorney's Office took no position on his request for additional compensation beyond $25,000; and (2) a material error of law when it awarded him compensation "without ever addressing Mr. Sanders's additional damages claim" or providing "reasoning." (R. 7:68–71.)

The Claims Board, by its Chairperson, denied Sanders's rehearing request. (R. 8:3–6, Pet.-App. 132–35.) As to Sanders's alleged "error of fact" argument, the Claims Board explained that the District Attorney's Office stated via email that it was not opposing Sanders's petition for $25,000 and took no position on his request for additional compensation. (R. 8:3, Pet.-App. 132.) It attached the emails reflecting that correspondence. (R. 8:4–6, Pet.-App. 133–35.)

As to Sanders's "error of law" argument, the Claims Board explained that its decision "clearly states that the board unanimously voted to award compensation in the amount of $25,000." (R. 8:4, Pet.-App. 133.) "Because the Board did not conclude that the amount which it was able to

award was 'not adequate compensation,' it is not required to submit a report to the legislature 'specifying an amount which it considers adequate.'" (R. 8:4, Pet.-App. 133.) The "absence of an explicit statement regarding the request for additional damages does not render the Board's decision incomplete." (R. 8:4, Pet.-App. 133.)

III. The circuit court denied Sanders's petition for judicial review.

A. Sanders raised four arguments in his chapter 227 petition for judicial review.

Sanders, *pro se*, filed a chapter 227 petition for judicial review of the Claims Board's decision. (R. 1; 14; *see also* 19 (Sanders's reply brief).) He raised multiple arguments, only the two of which are at issue before this Court.

First, Sanders argued that the "fairness of the proceedings or the correctness of the action has been impaired by material error in procedure" because the Claims Board "failed to exercise its discretion" to address his claim for additional compensation or explain why it did not "refer the matter to the legislature." (R. 14:7–9.) He asserted that the Claims Board's decision to hold the December hearing reflected that it "must have at least thought about his additional damages claim." (R. 14:8.)

Second, Sanders argued that the Claims Board exceeded its statutory authority by relying on "ex parte communication" with the District Attorney's Office "outside the hearing record, and petitioner's knowledge." (R. 14:10.) He noted that he did not learn about the clarification email communication with the District Attorney's Office until the Claims Board's decision denying rehearing; he argued this violated Wis. Stat. § 16.007(2). (R. 14:12–13.) As to prejudice, Sanders argued he would have "inquired" about why a deputy

district attorney (as opposed to the District Attorney) offered the clarification. (R. 14:20–21.)

Sanders made additional arguments. He argued that the Claims Board's "exercise of discretion [was] inconsistent with agency rule and prior practice"—"essentially," "an equal protection claim" based on compensation awarded to others who spent "less time incarcerated." (R. 14:5–7.) He pointed to another case where the Claims Board stated it was "[d]eclin[ing] . . . to recommend additional damages to the legislature. . ." (R. 14:18.) He argued that by not making a recommendation for additional compensation to the Legislature, the Claims Board deprived him of a First Amendment "right of access to the Courts to file suit against the state." (R. 14:10.) Lastly, he argued that the Claims Board violated "due process" because it did not "consider or address" his "request for waiver of immunity." (R. 14:13–14.)

The Claims Board asked the circuit court to dismiss Sanders's petition and affirm its decision. (R. 15.) It argued that Wis. Stat. § 775.05(4) requires it only to submit a report on additional compensation to the Legislature if it first finds that the statutory maximum is not adequate compensation. (R. 15:7.) Unless the Claims Board finds that the maximum is inadequate, it explained, the statute requires no action on a request for additional compensation. (R. 15:7.)

As to Sanders's *ex parte* communication argument, the Claims Board responded that Sanders "does not adequately explain how this was a violation of the statutes, nor does he explain how he was prejudiced by this action." (R. 15:8 (footnote omitted).)

The Claims Board also argued that its prior decisions in other cases, "based on the unique facts of each of those matters," do not constitute a "prior agency practice" and that Sanders's "equal protection" argument would eliminate the Claims Board's discretion. (R. 15:5–6; 9.) The Claims Board

noted that Sanders conceded that the Legislature is the only proper body to authorize suits against the State, which defeated his First Amendment and immunity-waiver arguments. (R. 15:7–9.)

B. The circuit court issued a written decision affirming the Claims Board's decision.

The circuit court affirmed the Claims Board's decision and dismissed Sanders's petition for judicial review via written decision and order. (R. 23, Pet.-App. 121–27.)

The circuit court noted that Sanders pointed to "no administrative rule, policy, or prior practice that requires the Board to expressly address his additional damages claim in its final decision." (R. 23:5, Pet.-App. 125.) It found "unpersuasive" Sanders's reliance on the text of Wis. Stat. § 775.05(4) itself, as that text provides that the Claims Board needs to submit a report to the Legislature for additional compensation only "*if* it finds the statutory maximum is not adequate." (R. 23:5 (emphasis in original), Pet.-App. 125.) Because the Claims Board "did not" find "that $25,000 was inadequate compensation," "it was therefore not required to take further action." (R. 23:5, Pet.-App. 125.)

The court rejected as undeveloped Sanders's argument that the Claims Board engaged in improper *ex parte* communication with the District Attorney's Office. (R. 23:6, Pet.-App. 126.) It also noted that the Claims Board had "engaged in similar notice giving and follow-up communication with him during its investigation into his claim." (R. 23:6, Pet.-App. 126.)

The court also rejected Sanders's argument that prior examples of the Claims Board submitting a report to the Legislature on additional compensation in "factually distinguishable" cases established "prior agency practice" the Claims Board had to follow. (R. 23:6, Pet.-App. 126.) It

rejected Sanders's immunity-waiver arguments. (R. 23:7, Pet.-App. 127.)

Lastly, the circuit court rejected Sanders's "harmless error and prejudice[ ]" arguments as "unpersuasive." It held that the Claims Board "adequately exercised its discretion and did not otherwise act outside of the law, administrative rules, or agency prior practice." (R. 23:7, Pet.-App. 127.)

IV. In a split decision, the court of appeals held that Wis. Stat. § 775.05(4) required the Claims Board to affirmatively explain why it did not submit a report to the Legislature on additional compensation for Sanders.

Sanders appealed. (R. 26.) He renewed his arguments that the Claims Board erred by not explaining in its decision why it did not recommend additional compensation and that he was improperly denied a waiver of State sovereign immunity. (*See generally* Sanders's COA Brs.) He also argued that the Claims Board's not submitting a report regarding additional compensation departed from prior "practice" and that the Claims Board engaged in improper *ex parte* communication with the District Attorney's Office. (*See generally* Sanders's COA Brs.)

A. The majority opinion concluded that the Claims Board failed to properly exercise its discretion by not explaining why it did *not* submit a report to the Legislature regarding additional compensation for Sanders.

In a two-to-one decision authored by Judge Kloppenburg, the Court of Appeals reversed and remanded. *Sanders v. State of Wisconsin Claims Board*, No. 2021AP373, 2022 WL 2070388 (Wis. Ct. App. June 9, 2022) (unpublished), (Pet.-App. 101–20).

The court held 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.* ¶ 30, (Pet.-App. 105). It continued: "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.* ¶ 50, (Pet.-App. 108).

The court concluded that the Claims Board did not properly exercise its discretion because neither its initial decision nor its rehearing-denial decision contained "fact-finding or analysis" regarding Sanders's request for compensation above the statutory maximum. *Id.* ¶¶ 31–34, (Pet.-App. 105–06). It reversed and remanded for the Claims Board to "properly exercise its discretion as to whether the statutory maximum amount of $25,000 that it awarded is or is not adequate compensation where, as here, additional compensation was requested." *Id.* ¶ 53, (Pet.-App. 109).

Though it recognized that it "need not consider" Sanders's additional arguments, the Court of Appeals majority "briefly" addressed them "for the sake of completeness." *Id.* ¶ 48. Other than Sanders's *ex parte* communications argument, it rejected Sanders's other arguments outright. *Id.* ¶¶ 41–48 n.5, (Pet.-App. 107–08, 118).

As to Sanders's *ex parte* communication argument, the court pointed to his reliance on Black's Law Dictionary's definition of "ex parte communication" and noted that if, as the Claims Board argued, "there is no difference that matters" between the District Attorney's Office's statements of position, "it is not clear why the Claims Board sought clarification of the former position and states in its initial decision only the latter position." *Id.* ¶ 47, (Pet.-App. 108). It

also pointed to due process caselaw on *ex parte* communication. *Id.* ¶ 45, (Pet.-App. 107–08).

B. Judge Fitzpatrick dissented.

Judge Fitzpatrick dissented from the decision. *Sanders*, 2022 WL 2070388, ¶¶ 55–112 (Fitzpatrick, J., dissenting), (Pet.-App. 109–17).

He concluded that the majority "grafted" onto Wis. Stat. § 775.05(4) a "process the legislature has not sanctioned." *Id.* ¶ 56 (Fitzpatrick, J., dissenting), (Pet.-App. 109). "[A]s a result, those conclusions in the majority opinion are contrary to policy choices made by the legislature." *Id.* "If the legislature wanted an explanation and analysis from the Claims Board in the second step as to why $25,000 is adequate compensation, the legislature would have stated that. It did not, and that makes all the difference." *Id.* ¶ 79 (Fitzpatrick, J., dissenting), (Pet.-App. 113).

Judge Fitzpatrick also agreed with the Claims Board that Sanders could not show any harm from the Claims Board's not explicitly stating that it found $25,000 to be adequate compensation. *Id.* ¶¶ 92–97 (Fitzpatrick, J., dissenting), (Pet.-App. 114–15).

As to Sanders's *ex parte* communication argument, Judge Fitzpatrick concluded that "[n]othing in the applicable statutes leads to the conclusion that ex parte communications are barred in proceedings of the Claims Board." *Id.* ¶ 102 (Fitzpatrick, J., dissenting), (Pet.-App. 116). He noted that the majority made a due process argument that "Sanders does not make" regarding emails with the District Attorney's Office and concluded that Sanders could not show any prejudice from those emails. *Id.* ¶¶ 105–11 (Fitzpatrick, J., dissenting), (Pet.-App. 116–17).

Judge Fitzpatrick agreed with the majority's rejection of Sanders's other arguments. *Id.* ¶¶ 59–61 (Fitzpatrick, J., dissenting), (Pet.-App. 110).

V. This Court granted the Claims Board's petition for review.

The Claims Board petitioned for review. Sanders, now by counsel, filed a response opposing the petition. Sanders did not seek review of any issues. This Court granted the Claims Board's petition.

STANDARDS OF REVIEW

Statutory interpretation presents a question of law this Court reviews de novo. *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 17, 336 Wis. 2d 318, 801 N.W.2d 316.

The "findings and the awards of the claims board shall be subject to review as provided in ch. 227." Wis. Stat. § 775.05(5). Under chapter 227 review, this Court reviews the Claims Board's decision, not the circuit court's decision. *Tetra Tech EC, Inc. v. Wis. Dep't of Rev.*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21 (lead op.).

This Court reviews the Claims Board's legal conclusions de novo. *Tetra Tech*, 382 Wis. 2d 496, ¶ 84 (lead op.). This Court affords due weight to the experience and specialized knowledge of the Claims Board, as well as to its conferred discretionary authority. *Id.* ¶ 78; Wis. Stat. § 227.57(10).

ARGUMENT

I. Wisconsin Stat. § 775.05(4) does not require the Claims Board to affirmatively explain why it does not submit a report to the Legislature regarding additional compensation beyond the statutory maximum.

The Claims Board here acted in accordance with Wis. Stat. § 775.05(4) by awarding Sanders the statutory maximum and not submitting a report to the Legislature for additional compensation. The plain statutory language does not require the Claims Board to explain why it does not submit a report to the Legislature regarding additional compensation beyond the maximum it is allowed to award. In holding otherwise, the court of appeals majority rewrote Wis. Stat. § 775.05(4), contrary to principles of statutory interpretation and statutory history. If this Court nevertheless disagreed, any error would be harmless.

A. Statutory interpretation demands fidelity to the text and prohibits adding words to that text.

Statutory interpretation "begins with the language of the statute." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Statutory language is given its "common, ordinary, and accepted meaning" except where technically defined. *Id.* ¶ 45. It is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46.

Courts are "not at liberty to disregard the plain, clear words of the statute." *Kalal*, 271 Wis. 2d 633, ¶ 46 (citation omitted). Courts also "may not add words to the statute's text." *DWD v. LIRC*, 2017 WI App 68, ¶ 23, 378 Wis. 2d 226, 903 N.W.2d 303. "[W]hat a text chooses *not* to do" is as

significant "as its affirmative dispositions." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 57 (2012).

The "absent provision cannot be supplied by the courts" because "[t]he search for what the legislature 'would have wanted' is. . . 'nothing else than the difference between the positive law and some other order considered to be better, truer, and juster.'" *Id.* at 94–95 (citation omitted); *see also Dawson*, 336 Wis. 2d 318, ¶ 42 ("We decline to read into the statute words the legislature did not see fit to write.").

B. Wisconsin Stat. § 775.05(4) requires the Claims Board to address a request for additional compensation only *if* it first affirmatively finds that the statutory maximum is inadequate.

The statutory-interpretation analysis here is straightforward and compels one conclusion: The (1) Legislature's use of the word "if" in Wis. Stat. § 775.05(4), (2) contrast between the Legislature's use of "if" and "shall" within the context of Wis. Stat. § 775.05, and (3) statutory history of Wis. Stat. § 775.05, all confirm that the Claims Board need not explain why it has not submitted a report to the Legislature regarding additional compensation beyond the statutory maximum.

1. Wisconsin Stat. § 775.05(4)'s plain language sets forth a two-step process and conditions the second step on the Claims Board reaching a non-required affirmative finding.

Wisconsin Stat. § 775.05(4)'s plain language creates a two-step procedure for the Claims Board's consideration of compensation for a petitioner who proves that he spent time in prison for a crime of which he is innocent. In the first step, the Claims Board must find the amount that will compensate the petitioner within the boundaries of the statutory $25,000

maximum. The second step, however, is triggered only *if* the Claims Board finds that the statutory maximum is inadequate. The statute does not require the Claims Board to so find and does not give the Claims Board any authority to award any additional compensation; instead, if it so finds, the Claims Board then must submit a report to the Legislature that the Legislature may or may not act on.

Here is the text of Wis. Stat. § 775.05(4), in full:

> 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).

a. In the first step, the Claims Board makes a limited monetary award for petitioners who have proven they are innocent of crimes for which they served imprisonment.

The Claims Board reaches the first step of Wis. Stat. § 775.05(4)'s compensation procedure if a petition is filed pursuant to Wis. Stat. § 775.05(2) and if the Claims Board finds that the petitioner has proven he was innocent pursuant to Wis. Stat. § 775.05(3).

Any person who has been imprisoned as the result of a Wisconsin conviction "of which crime the person claims to be innocent" "may petition the claims board for compensation for such imprisonment" under Wis. Stat. § 775.05(2).

The Claims Board "shall hear" these petitions and "shall transmit a copy thereof to the prosecutor who prosecuted the petitioner and the judge who sentenced the petitioner" "for the information of these persons." Wis. Stat. § 775.05(2). "After hearing the evidence on the petition," the Claims Board must find either that clear and convincing evidence shows that the person is innocent of the crime that led to the imprisonment, or not. Wis. Stat. § 775.05(3).

If the Claims Board finds the person has made the requisite innocence and non-contribution showings, the Claims Board may make a limited monetary award:

> 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.

Wis. Stat. § 775.05(4).

The Claims Board's responsibilities in this first compensation step are mandatory. Its "findings and the award" "shall be subject to review as provided in ch. 227." Wis. Stat. § 775.05(5).

b. In the second step, triggered only *if* the Claims Board finds that the statutory maximum is inadequate, the Claims Board submits a report to the Legislature.

The second step of Wis. Stat. § 775.05(4)'s compensation procedure imposes no affirmative requirement on the Claims Board. Instead, it is explicitly conditional, applying only *if* the Claims Board first finds that the amount it can award is inadequate:

> 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).

A plain language reading makes clear that the Claims Board has neither the discretion to award above the statutory maximum nor any duty to explicitly address requests for additional compensation beyond that maximum unless it finds that the statutory maximum is inadequate. Nothing in the plain statutory language requires it to so find.

Unlike the mandatory finding the Claims Board must make under step one, the finding triggering step two is conditional: "*If* the claims board finds that the amount it is able to award is not an adequate compensation," the Claims Board "shall submit a report specifying an amount which it considers adequate" to the Legislature. Wis. Stat. § 775.05(4).

Courts consult the dictionary to "guide the common, ordinary meaning of words." *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 10, 315 Wis. 2d 350, 760 N.W.2d 156. Here, "if" means "on condition that" or "in the event that." "*If*," Merriam-Webster Online Dictionary, https://www.merriam-

webster.com/dictionary/if (last visited Feb. 16, 2023) (definitions also include "allowing that" and "on the assumption that").

Thus, under the statutory text, only "on the condition that" or "in the event that" the Claims Board affirmatively finds the statutory maximum inadequate is it then required to address additional compensation *at all*. Put differently, nothing in the plain language of step two requires the Claims Board to explain why it has *not* found the statutory maximum to be inadequate (why it has not submitted a report to the Legislature on additional compensation).

And if the Claims Board does affirmatively find that the maximum is inadequate, the statutory language of step two expressly limits the Claims Board's authority to submitting a report to the Legislature "specifying an amount which it considers adequate." Wis. Stat. § 775.05(4). The statute leaves the Claims Board (or a reviewing court) with zero discretion or authority to award such compensation, and nothing requires the Legislature to act on the report.

In sum, as Judge Fitzpatrick recognized in his dissent below, Wis. Stat. § 775.05(4)'s plain language sets forth "a two-step mechanism, with discrete processes" for the Claims Board's awarding of compensation. *Sanders*, 2022 WL 2070388, ¶ 71 (Fitzpatrick, J., dissenting), (Pet.-App. 112). The "legislature's choice of the word 'if'" in the second step "denotes the clear direction that the remainder of the sentence concerning a report to the legislature is conditional, and the Claims Board need do nothing further to satisfy Wis. Stat. § 775.05(4) unless it first decides that $25,000 is not adequate compensation." *Id.* ¶ 74 (Fitzpatrick, J., dissenting), (Pet.-App. 112).

2. The contrast in Wis. Stat. § 775.05's language further shows that the Claims Board is not required to explain why it is not submitting a report for the Legislature on additional compensation.

Reading step two's language in context further shows that the Legislature's use of the conditional "if" means that the Claims Board is not required to affirmatively explain its reasoning not to submit a report to the Legislature on additional compensation. A contextual reading demonstrates that the Claims Board's ability to find the statutory maximum inadequate does not mean that it must offer an exercise of discretion either way.

Wisconsin Stat. § 775.05 shows that the Legislature knows full-well how to impose a mandatory requirement on the Claims Board where it wants to do that. Wisconsin Stat. § 775.05(3) provides that "[a]fter hearing the evidence on the petition, the claims board *shall* find either that the evidence is clear and convincing that the petitioner was innocent. . . or that the evidence is not." And "[i]f" the result of that requisite finding is that the petitioner is innocent and did not contribute to his imprisonment, the "claims board *shall* find the amount which will equitably compensate the petitioner, not to exceed $25,000." Wis. Stat. § 775.05(4).

Unlike that Wis. Stat. § 775.05(3) process (where the Claims Board must make a determination as to innocence), or step one of the compensation process (where the Claims Board must determine an award up to $25,000), the word "shall" appears regarding step two only *after* a conditional, optional event: —"*[i]f*" the Claims Board first affirmatively finds that the awardable maximum is inadequate. Wis. Stat. § 775.05(4). Nothing in the statute provides that the Claims Board *shall* make any finding as to additional compensation. This contextual reading thus further illustrates that the

Claims Board is not required by Wis. Stat. § 775.05(4) to explain why it is not submitting a report for the Legislature on additional compensation. *Kalal*, 271 Wis. 2d 633, ¶ 45.

3. Statutory history also confirms that the Claims Board need not explain why it does not submit a report for the Legislature regarding additional compensation.

Statutory history—review of the previously enacted and repealed provisions of a statute—is part of contextual plain-language interpretation. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581 ("[s]tatutory history is part of the context in which we interpret the words used in a statute"). The statutory history here further confirms that the Claims Board does not need to explain why it does not prepare a report for the Legislature regarding compensation above the $25,000 statutory maximum.

While it is always the case that courts "may not add words to the statute's text" when interpreting plain language, *DWD*, 378 Wis. 2d 266, ¶ 23, courts are particularly wary of statutory interpretations that "would be effectively writing back into the statute language the legislature expressly removed." *Crown Castle USA, Inc. v. Orion Const. Group, LLC*, 2012 WI 29, ¶ 37, 339 Wis. 2d 252, 811 N.W.2d 332.

Here, the Legislature enacted the first version of what today is Wis. Stat. § 775.05 in 1913. 1913 Wis. Act 189, § 1. Though subsection (4) of that 1913 statute is structured similarly to Wis. Stat. § 775.05(4) today, there is one important difference:

> If the board shall find that the petitioner was innocent of the crime or offense for which he has suffered imprisonment, and that he did not by his act or failure to act contribute to bring about the conviction and imprisonment for which he seeks compensation, *the board shall proceed to find the amount which will compensate the petitioner for his wrongful imprisonment.* Such board may award a compensation to the petitioner so found innocent of not to exceed five thousand dollars in any case, and at a rate of compensation not greater than fifteen hundred dollars per year for the imprisonment so unjustly suffered. If the board shall find that the amount they may be able to award will not be an adequate compensation to the petitioner they shall report an amount to the legislature which they shall deem to be adequate and shall recommend the appropriation by the legislature to the petitioner of the amount in excess of the amount they may have awarded.

1913 Wis. Act 189, § 1 (creating Wis. Stat. § 3203a(4) (1913)). The 1913 law thus required the board (not yet the Claims Board) to "find the amount which will compensate the petitioner," full stop.

The Legislature, however, revised that language in 1935 to remove the full finding requirement and instead limited the board's finding to the statutory maximum:

> If the commission shall find that the petitioner was innocent and that he did not by his act or failure to act contribute to bring about the conviction and imprisonment for which he seeks compensation, the commission *shall find the amount which will compensate him for his wrongful imprisonment but not to exceed five thousand dollars* and at a rate of compensation not greater than fifteen hundred dollars per year of imprisonment. If the commission shall find that the amount it is able to award will not be adequate compensation it shall report an amount to the legislature which it shall deem adequate.

Wis. Stat. § 285.05(4) (1935); 1935 Session Laws, ch. 483, § 5. Beyond changes to the statutory maximum amount and other

minor re-phrasings, the 1935 statute is structurally similar to Wis. Stat. § 775.05(4) today.[2]

The 1913 statute thus confirms that the Legislature knows how to ask the Claims Board to find overall total value for compensation if it wishes to do so, and the 1935 removal of that requirement further makes clear that the Claims Board is not required to address additional compensation under Wis. Stat. § 775.05(4) unless it first reaches a decision the statutory language does not require it to reach.

C. Courts have interpreted similar statutes using "if" to denote a conditional provision triggered by a certain affirmative event.

This plain-language reading of Wis. Stat. § 775.05(4) is how courts have interpreted the use of "if" in other statutes: to denote a conditional provision triggered by a certain event and thus required only when that event occurs.

For example, in explaining the Governor's powers to issue an executive order declaring a state of emergency under Wis. Stat. § 323.10, this Court held that "if" empowered the Governor to declare an emergency only if certain conditions first are met. That statute provides, in part, that "[t]he governor may issue an executive order. . . *if* he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists." This Court noted that the "governor's powers . . . are framed as a type of if-then statement (albeit without an explicit 'then')." *Fabick v. Evers*, 2021 WI 28, ¶ 23 n.7, 396 Wis. 2d 231, 956 N.W.2d 856. And

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[2] The commission designated by the statute changed to the Claims Board in 1969. *See* Wis. Stat. § 285.05 (1969). And in 1979, the Legislature made substantive revisions to the statute that had since been renumbered to Wis. Stat. § 775.05. The 1979 changes included increasing the statutory maximum, adding the word "equitably" before "compensate" in step one, and other minor phrasing changes. 1979 Wis. Act 126, § 2.

it explained that under the statutory language, "if and only if the governor finds a condition met may he declare a certain type of emergency." *Id.* The text "requires the condition be satisfied in order to enable, or trigger, the ability to declare a state of emergency." *Id.*

Similarly, in *Dodd v. United States*, 545 U.S. 353 (2005)[3], a case interpreting a statute of limitation that applied "if" the U.S. Supreme Court recognized a new right, the Supreme Court held that "if" meant "in the event that" or "on condition that." *Dodd*, 545 U.S. at 356. The Court held that Congress' use of the word "if" in the statute imposed a "condition on the applicability of [the] subsection." *Id.* at 358.

The same interpretation of "if" applies here: by using the word "if" before discussing additional compensation, the Legislature expressly conditioned the Claims Board's need to address additional compensation *at all* on the triggering event of it affirmatively finding the statutory maximum inadequate.

D. The Claims Board complied fully with Wis. Stat. § 775.05(4) in addressing compensation for Sanders.

The application of the plain statutory language is straightforward: after finding that Sanders established by clear and convincing evidence that he was innocent of the homicide crime for which he was imprisoned and did not contribute to bring about his imprisonment, the Claims Board awarded him $25,000 compensation. (R. 7:56–59, Pet.-App. 128–31.) Because the Claims Board did not affirmatively find that the statutory maximum was "not an adequate compensation," it did not need to address Sanders's request for additional compensation.

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[3] *See also Sanders*, 2022 WL 2070388, ¶ 75 (Fitzpatrick, J., dissenting, discussing *Dodd*), (Pet.-App. 112).

It really is that simple.

E. The court of appeals majority rewrote Wis. Stat. § 775.05(4) to impose an affirmative requirement on the Claims Board that does not exist in the statutory language.

Veering from the plain statutory text, the court of appeals majority held that the Claims Board failed to properly exercise its discretion by not explaining why it did *not* submit a report for the Legislature regarding additional compensation. To reach this atextual conclusion, the majority rewrote Wis. Stat. § 775.05(4) to ignore the Legislature's use of "if" and impose a duty on the Claims Board to make a total-value compensation determination that the Legislature did not impose. As Judge Fitzpatrick recognized in dissent, in so doing, the court of appeals majority "grafted onto" the statutory text "a process the legislature has not sanctioned." *Sanders*, 2022 WL 2070388, ¶ 56 (Fitzpatrick, J., dissenting), (Pet.-App. 109).

The majority's holding may have been well-intentioned, but statutory interpretation does not turn on how a court believes the statute *should* function. It turns on the law the Legislature actually wrote.

Though nothing in the plain text of Wis. Stat. § 775.05(4) requires the Claims Board to explain why it does *not* submit a report on additional compensation to the Legislature, the majority nevertheless held that the Claims Board here failed to properly exercise discretion by not doing just that.

The court of appeals majority's rationale evinced the type of "search for what the legislature 'would have wanted'" that foregoes the "positive law" for "some other order" the Court of Appeals "considered to be better, truer, and juster." Scalia & Garner, *Reading Law*, at 95. Though the majority recognized that the plain language of Wis. Stat.

§ 775.05(4) creates "two separate" components as to compensation, it nevertheless reasoned that the Legislature's "use of the terms 'equitable' and 'adequate' establishes the connection between these two discretionary determinations" and held that the "second part of the compensation obligation extends the Claims Board's exercise of discretion to determine whether the amount that it is able to award is adequate." *Sanders*, 2022 WL 2070388, ¶¶ 26–29, (Pet.-App. 105).

In so doing, the majority made four immediate mistakes:

First, it ignored the Legislature's use of the word "if." Its dismissal of the dissent's application of the word as "hyper-literal, *Sanders*, 2022 WL 2070388, ¶ 52 n.7, (Pet.-App. 118), was incorrect: courts *cannot* ignore words in statutes, *Kalal*, 271 Wis. 2d 633, ¶ 46, regardless of whether they are long or short.

Second, it did not consider the Legislature's use of "equitably" in step one and "adequate" in step two in their respective contexts. Instead—contrary to statutory-interpretation principles—the majority read (and defined) those two terms in isolation. *Kalal*, 271 Wis. 2d 633, ¶ 46. From its isolated readings, it mistakenly concluded that the use of terms dealing with fairness and sufficiency "connect[ed]" the two steps to create one overall total-value discretionary determination requirement: "The legislature's use of the terms 'equitable' and 'adequate' establishes the connection between these two discretionary determinations . . . Applying the[ ] dictionary definitions . . . the Claims Board must determine whether the maximum amount that it is able to award is sufficient ("adequate") to fairly ("equitably") compensate the petitioner." *Sanders*, 2022 WL 2070388, ¶ 28, (Pet.-App. 105).

This flawed analysis reinforces why reading statutory language in its context is so important: the Claims Board's

discretion to determine what will "equitably" compensate a petitioner expressly *cannot* "exceed $25,000," and the Legislature only saw fit to either permit or compel any further action from the Claims Board on compensation if the Claims Board finds that the amount it can award is "*not* . . . adequate." Wis. Stat. § 775.05(4).

The majority's critique of the dissent revealed its vision for the Claims Board to make reviewable findings about unlimited compensation, discussing "the gravity underlying the exercise of [the Claims Board's] discretionary authority when a person has unlawfully suffered a loss of liberty." *Sanders*, 2022 WL 2070388, ¶ 52 n.7, (Pet.-App. 118). As the dissent recognized, however, in so doing, the majority would "recast[ ] the Claims Board into a tribunal that sets a total value, such as a jury would . . . and further requires that the Claims Board spell out how the Board determined that exact amount." *Sanders*, 2022 WL 2070388, ¶ 56 (Fitzpatrick, J., dissenting), (Pet.-App. 109). As both the plain statutory language and the statutory history show, that recast rewrites the law. Indeed, the Legislature's *removal* of the very total-value finding requirement in 1935 that the majority tried to read back in here shows that its interpretation cannot be correct. *See supra* Section I.B.3.

Third, the majority also borrowed caselaw concerning the duties, equitable authority, and standards for review of decisions of courts and agencies acting in a quasi-adjudicative capacity and mistakenly applied the same powers and duties to the Claims Board. *Sanders*, 2022 WL 2070388, ¶ 19 (discussing caselaw applicable to court decisions); *see also id* ¶ 88 (Fitzpatrick, J., dissenting) (criticizing the majority's reliance on caselaw applicable to courts), (Pet.-App. 114). The majority heavily emphasized *Reidinger, O.D. v. Optometry Examining Bd.*, 81 Wis. 2d 292, 260 N.W.2d 270, 297–98 (1977), which held that the Optometry Examining Board

must demonstrate a process of reasoning in exercising its power to deny, suspend, or revoke a license.

But Wis. Stat. § 775.05(4)'s plain language makes clear that the Claims Board cannot be equated with a court exercising sentencing discretion or a jury setting the total dollar value of a tort claim. Similarly, in contrast to a court or an agency making a quasi-adjudicatory decision, the Claims Board has *no* authority to award compensation above the statutory maximum. Any report to the Legislature is just that—a report—and the Legislature then has no legal duty to act on that report in any way.[4]

Fourth, the majority's analysis rests on the mistaken premise that the Claims Board's decision on submitting a report to the Legislature regarding additional compensation is judicially reviewable, when it is not. Notably, Wis. Stat. § 775.05(4) sets forth no "substantive criteria" by which a petitioner could claim—or a reviewing court could analyze—any asserted injury on that decision. *Friends of Black River Forest v. Kohler Company*, 2022 WI 52, ¶ 33, 402 Wis. 2d 587, 977 N.W.2d 342 (holding, in the context of standing, that a statute that does not set forth "substantive criteria" by which a chapter 227 petitioner could challenge a particular decision means that the person has no interests that the statute protects).

The contrast with other provisions in Wis. Stat. § 775.05 that *do* provide criteria for the respective determinations makes this plain: Wisconsin Stat. § 775.05(3) sets forth a standard of review (clear and convincing evidence) for the Claims Board's innocence determination: "[T]he claims board shall find either that the evidence is clear and convincing that

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[4] The majority's citation to *Argonaut Ins. Co. v. Labor and Ind. Rev. Comm'n.*, 132 Wis. 2d 385, 391–92, 392 N.W.2d 837 (Ct. App. 1986), fails for the same reasons. *See Sanders*, 2022 WL 2070388, ¶ 20, (Pet.-App. 103–04).

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." And step one of Wis. Stat. § 775.05(4)'s compensation procedure provides that the Claims Board "shall find the amount which will equitably compensate the petitioner, not to exceed $25,000." That is *not* true on step two of the compensation procedure; instead, the plain language provides that if the Claims Board affirmatively decides the maximum is not adequate, it shall submit a report specifying the amount the Claims Board "considers adequate." Wis. Stat. § 775.05(4).

In sum, the court of appeals majority attempted to transform the Claims Board into a body it is not: one equipped and required to make a determination about the petitioner's total appropriate compensation. The statute does not give the Claims Board either that duty or that power. This Court should reject the majority's mistaken statutory interpretation and return the analysis to the text of the statute the Legislature wrote.

F. If this Court nevertheless adopted the court of appeals majority's interpretation, any error was harmless.

Because the Claims Board acted in accordance with Wis. Stat. § 775.05(4), this Court need not consider harmless error. But if this Court should nevertheless adopt the court of appeals majority's statutory interpretation, this Court should still reverse the holding because any error would be harmless.

The Claims Board believes that Chapter 227 review does not extend to its decision not to submit a report to the Legislature regarding additional compensation. But if the court of appeals majority were correct that the Claims Board must make "findings" about that choice subject to judicial review, Chapter 227 would still limit the scope of judicial review of the Claims Board's decision. Wis Stat. § 227.57(2)

("Unless the court finds a ground for . . . remanding . . . under a specified provision of this section, it shall affirm."). A reviewing court "shall not substitute its judgment for that of the [Board] on an issue of discretion." Wis. Stat. § 227.57(8).

In accordance with the limited scope of review of discretionary board or agency decisions under chapter 227, the court of appeals has before applied harmless error where a board or agency fails to make a specific requisite finding where remand for factfinding would not make a difference. In *Houslet v. DNR*, 110 Wis. 2d 280, 281, 289–91, 329 N.W.2d 219 (Ct. App. 1982), the court held that though the agency there was required to make specific findings that it did not affirmatively make, remand was unwarranted because the agency properly denied the contract at issue on other grounds: remand would not make a difference. *Id.*

Here, requiring the Claims Board to expressly state "we find that $25,000 is adequate compensation" will not make any difference to Sanders's petition. Therefore, just as in *Houslet*, harmless error should apply here, too.[5] *See Sanders*, 2022 WL 2070388, ¶¶ 94–96 (Fitzpatrick, J., dissenting), (Pet.-App. 114–15).

The court of appeals majority rejected a harmless error framework on the theory that the Claims Board must explain why it was not submitting a report to the Legislature so that the court of appeals would have a "discernible . . . rationale" to review. *Sanders*, 2022 WL 2070388, ¶¶ 51–52, (Pet.-App. 109). But such judicial review could give Sanders no right to additional compensation. If the Claims Board explained why $25,000 was adequate and the court of appeals disagreed, it could—at most—order the Claims Board to write a report to

[5] Though Sanders has not so argued, he also could not plausibly argue that the Claims Board was somehow unaware of his request for additional compensation, given that he was asked about it at the hearing. (R. 7:66; 8:4.)

the Legislature. But that report would give Sanders no right to additional compensation: he could not force the Legislature to pass a law paying him money.

* * *

If the Claims Board finds that a petitioner is innocent of a crime for which he was imprisoned and did not contribute to bring about his conviction or imprisonment, the Claims Board must determine an amount that will compensate him up to $25,000. There, the Claims Board's duties to make findings end. It need take further action only *if* it finds that the statutory maximum is inadequate, and even then, its duty is not to make discretionary findings about the total amount that would suffice, but only to write the Legislature a report.

The Claims Board here did its job: it found Sanders to be innocent of the homicide and that he did not contribute to his imprisonment, and it awarded him the maximum it had the ability to award. Because it did not affirmatively find that maximum was inadequate, it did not need to address additional compensation. This Court should reverse the court of appeals' decision.

II. Sanders cannot show that the Claims Board engaged in any improper communication with the District Attorney's Office that prejudiced him resulting in material error.

Sanders also argued below that the Claims Board engaged in improper *ex parte* communication by seeking clarification from the District Attorney's Office on its position on Sanders's petition. Though Sanders never developed his argument, even if he had, the Claims Board acted properly in seeking the clarification. And Sanders comes nowhere close to being able to show any prejudice resulting from the clarification. Given the court of appeals majority's problematic discussion of this issue, and to avoid further litigation on remand, this Court should hold that Sanders is

not entitled to reversal or remand of the Claims Board's decision because Claims Board staff sought clarification of the prosecuting office's position.

A. The Claims Board properly sought clarification from the District Attorney's Office on its position on Sanders's petition.

While, as argued below, Sanders's *ex parte* communication argument quickly fails because he cannot show any prejudice, it fails most fundamentally because the Claims Board acted properly in seeking and obtaining clarification from the District Attorney's Office on its position regarding Sanders's petition.

First, Wisconsin Stat. § 775.05(2) specifically contemplates the Claims Board having precisely this type of communication with the prosecuting attorney's office when considering a petition. Indeed, it *requires* the Claims Board to "transmit a copy" of a petition for compensation "to the prosecutor who prosecuted the petitioner . . . for the information of these persons."

Second, Wis. Stat. § 227.50's limitations on certain *ex parte* communications in certain hearings does not apply to a Claims Board hearing under Wis. Stat. § 775.05. Wisconsin Stat. § 227.50 imposes some limitations on *ex parte* communications in "contested cases" under chapter 227. Wisconsin Stat. § 227.50(1)'s general prohibition *against ex parte* communication "relative to the merits or a threat or offer of reward," however, "comes into play *only if* the contested case provisions of § 227.42(1) apply." *Marder v. Bd. of Regents of the Univ. of Wis. System*, 2005 WI 159, ¶ 24, 286 Wis. 2d 252, 706 N.W.2d 110 (emphasis added).

A Claims Board hearing under Wis. Stat. § 775.05 is not a hearing covered by Wis. Stat. § 227.50, because it is not a "contested case" hearing under Wis. Stat. § 227.42. Wisconsin Stat. § 227.03(5) specifically states that chapter 227 does not

apply to Claims Board's proceedings "except as provided in ss. 775.05(5), 775.06(7), and 775.11(2)." Wisconsin Stat. § 775.05(5), in turn, makes only the judicial review provisions of chapter 227 applicable, *not* its administrative hearing procedures: the "findings and the award of the claims board shall be subject to review as provided in ch. 227."

Sanders has rightly never attempted to argue that a Claims Board Wis. Stat. § 775.05 hearing would constitute a "contested case" hearing covered by Wis. Stat. § 227.50. Instead, he repeatedly failed to develop his *ex parte* communication argument below. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (holding that courts need not consider undeveloped arguments). The circuit court rejected it as undeveloped. (R. 23:6, Pet.-App. 126.) And in the court of appeals, Sanders simply pointed to Wis. Stat. § 16.007(2) and Black's Law Dictionary's definition of "ex parte communication." Neither argument offers Sanders any help.

Wisconsin Stat. § 16.007(2) provides that, with an exception not relevant here, the Claims Board "shall *not* be bound by common law or statutory rules of evidence." It also provides that the Claims Board "may take official notice of any generally recognized fact or established technical or scientific fact," but the parties "shall be notified" of the noticed facts and "afforded an opportunity to contest the validity of the official notice." Wis. Stat. § 16.007(2).

Sanders did not explain—and ultimately cannot explain—how Wis. Stat. § 16.007(2) would render the Claims Board's communication with the District Attorney's Office improper *ex parte* communication. Nor can he explain how Black's Law Dictionary's definition of "ex parte communication" helps without any applicable Wisconsin statute. (*See* Sanders COA Initial Br. 10.)

Put simply, Sanders cannot point to any statute that would prohibit the Claims Board from obtaining clarification

from a prosecuting office as it did here; instead, Wis. Stat. § 775.05 directly contemplates it.

B. Sanders cannot show any prejudice to a material degree from the Claims Board seeking clarification from the District Attorney's Office.

Sanders *ex parte* communication argument also fails on prejudice grounds. "[M]aterial error occurs when a party not notified of an ex parte communication is prejudiced by the inability to rebut facts presented in the communication and where improper influence upon the decision-making appears with reasonable certainty." *Seebach v. Public Serv. Comm'n*, 97 Wis. 2d 712, 721, 295 N.W.2d 753 (Ct. App. 1980), (Pet.-App. 140).[6] The party alleging prejudice from the communication has the burden to prove "prejudice[ ] . . . to a material degree." *Id.*

Sanders conceded below that to succeed on his *ex parte* communication claim he had to show any error was material and prejudiced him. (Sanders's COA Initial Br. 13.)

Sanders cannot show he suffered any prejudice to a material degree from the Claims Board's clarification email exchange with the District Attorney's Office. Why not? Because the District Attorney's Office originally made clear that it had no objection to Sanders's petition; when the District Attorney's Office provided email clarification, it *still* had no objection to his petition. It just made clear that it did not oppose the request for the statutory maximum and took

[6] Though *Seebach* is a published 1980 Court of Appeals decision, there appears to be an error in Westlaw regarding the link to the case. For the Court's convenience, the Claims Board includes a copy of the decision from the Wisconsin Reporter in its appendix. (Pet.-App. 136–45.)

no position on additional compensation and left that to the Claims Board. (*Compare* R. 5:63 *with* R. 6:31.)

Put simply, the email exchange did not offer any new objection to—or facts against—Sanders's request for additional compensation. Sanders comes nowhere close to prejudice "to a material degree." *Seebach*, 97 Wis. 2d at 721, (Pet.-App. 140).

The court of appeals majority noted that "if there is no difference, then it is not clear why the Claims Board sought clarification of the former position and states in its initial decision only the latter position." *Sanders*, 2022 WL 2070388, ¶ 47, (Pet.-App. 108). This reasoning overlooks that the Claims Board only sought the clarification after the District Attorney's Office informed the Claims Board that it would not be sending any representative to the hearing set by the Claims Board. (R. 6:31.) It also overlooks that a mere whisp of possibility does not prove prejudice to a material degree. *Seebach*, 97 Wis. at 721–24, (Pet.-App. 140–42).

Sanders cannot show that he missed an opportunity to "rebut facts presented in the communication." *Seebach*, 97 Wis. 2d at 721, (Pet.-App. 140). He also cannot show with "reasonable certainty" that this clarification email exchange exerted "improper influence" on the Claims Board's decision concerning additional compensation, *id.*, because the District Attorney's Office explicitly stated in that clarification email that it was "*not* taking any position" on Sanders's claim for additional compensation. (R. 6:31 (emphasis added).)

In another problematic element of the court of appeals majority's opinion, the majority advanced a due process *ex parte* communication that Sanders never raised. *Compare* (Sanders's COA Brs.) *with Sanders*, 2022 WL 2070388, ¶ 45, (Pet.-App. 107–08); *see also id.*, ¶ 105 (Fitzpatrick, J., dissenting) ("[m]aking an argument that Sanders does not make . . . the majority opinion relies on due process

considerations"), (Pet.-App. 116); *Pettit*, 171 Wis. 2d at 647 (Courts "cannot serve as both advocate and judge.").

While the majority's cited caselaw is distinguishable for many reasons, that caselaw too recognizes that to succeed, a challenger must show prejudice: "[N]ot every *ex parte* communication is a procedural defect. . . that [ ] undermines the due process guarantee. . . Only *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee." *Sanders*, 2022 WL 2070388, ¶ 45 (quoting *Marder*, 286 Wis. 2d 252, ¶ 33, (Pet.-App. 107–08). And Sanders cannot show prejudice where the clarification email did not offer any facts against or opposition to his request for additional compensation.

As to the prejudice arguments Sanders actually raised below, Sanders primarily argued that had he been aware of the exchange, he could have inquired as to why the clarification email came from a *deputy* district attorney instead of from the District Attorney himself. (*See* Sanders's COA Br. 12–13.) But Sanders has offered nothing to even suggest that the Deputy District Attorney was somehow speaking on behalf of some entity other than the District Attorney's Office.

Beyond that, Sanders also argued below that the Claims Board's Program and Policy Analyst who corresponded with the District Attorney's Office "held improper influence" over the Claims Board because she was not one of its voting members. (Sanders's COA Br. 26–27.) Sanders, however, failed to connect any dots to explain how or why that would show prejudice.

This Court should hold that Sanders is not entitled to reverse or remand of the Claims Board's decision based on Claims Board staff seeking clarification of the District Attorney's Office's position.[7]

[7] The court of appeals' majority rejected Sanders's other arguments challenging the Claims Board's decision. *Sanders*, 2022 WL 2070388, ¶¶ 41–48 n.5, (Pet.-App. 107–08, 118). As Sanders neither filed a cross-petition nor addressed his other arguments in his response to the Claims Board's petition, he has forfeited any further review of those arguments and cannot argue them before this Court. *State v. Smith*, 2016 WI 23, ¶ 41, 367 Wis. 2d 483, 878 N.W.2d 135; *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659.

CONCLUSION

This Court should reverse the court of appeals and hold that Wis. Stat. § 775.05(4) does not require the Claims Board to affirmatively explain why it does not submit a report to the Legislature regarding additional compensation beyond the statutory maximum. It should also hold that Sanders cannot justify reversing or remanding the Claims Board's decision based on its staff's clarification email exchange with the District Attorney's Office.

Dated this 17th day of February 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,727 words.

Dated this 17th day of February 2023.

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I certify that in compliance with the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02 and Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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Electronically signed by:

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § (Rule) 809.23 (3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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