STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2023AP001764

MARIO VICTORIA VASQUEZ,

Plaintiff-Appellant,

v.

STATE OF WISCONSIN CLAIMS BOARD,

Defendant-Respondent.

ON APPEAL FROM A DECISION AND ORDER UPHOLDING CLAIMS BOARD DECISION ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE TIMOTHY A. HINKFUSS, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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SUMMARY ARGUMENT

In 1998, Mario Vasquez—a man with no history of violence or inappropriate behavior—was convicted of a crime he did not commit and was sent to prison. In 2015 the State agreed that Mr. Vasquez's conviction had to be vacated and the Brown County Circuit Court vacated his conviction without a hearing: the State did not re-file any charges against him. As an innocent man who had 16 years of his life wrongly taken, Mr. Vasquez petitioned for compensation under Wis. Stat. § 775.05.

Mr. Vasquez's conviction was based entirely on circumstantial evidence. The allegations in the case stemmed from 4-year-old G.T.'s claims that "Mario" assaulted her.[1] However, G.T. had at least three adults named Mario in her life. G.T. contracted herpes from the person who assaulted her. G.T.'s "Uncle Mario" had herpes at the time, despite lying on the stand that he did not. Further, G.T. told police on numerous occasions that her ***Uncle Mario*** was her assaulter. In contrast, Mario Vasquez, the petitioner in this case, was not related to G.T., had no interaction with her, and did not have herpes at the time. During the investigation, he repeatedly offered to provide DNA or submit himself to examination by a medical expert from the State.

[1] Pursuant to Wis. Stat. § 809.19(g) the brief refers to the victim by her initials.

Most telling, G.T. never identified Mr. Vasquez as her assailant. Instead, at trial, G.T. testified that the man who assaulted her was not the man sitting at the defense table. During the State's direct examination of G.T. the following exchange occurred despite the fact that Mr. Vasquez was fully visible to her from counsel's table:

> Q: Is Mario in the courtroom?
> A: No.
> Q: Can you look around the courtroom, [G.T.]?
> A: No.

(7:7). On cross-examination, G.T reiterated that her abuser was not present:

> Q: Which one is Mario?
> A: He's not here.

(*Id*. (quoting Trial Tr. 179)).

A person whose conviction is vacated is presumed to be innocent. The State Claims Board ("the Board") has the power to provide "for the relief of innocent persons who have been convicted of a crime." § 775.05(1). Mr. Vasquez's conviction was vacated and he came to the Board seeking relief as an innocent man.

The Board erroneously concluded "… that the evidence is not clear and convincing that Vasquez was innocent of the crime for which he was imprisoned." By so concluding, the Board has turned innocence on its head.

In refusing to compensate Mr. Vasquez, the Board erred in three ways. First, the Board violated Mr. Vasquez's Statutory and Constitutional Due Process rights by preventing him from presenting evidence at the hearing while inviting the State to offer unsworn, uncorroborated assertions as evidence of possible guilt. Second, the Board required Mr. Vasquez to meet a higher burden of proof than required by statute to prove his innocence, despite the law presuming his innocence and as supported by G.T.'s sworn trial testimony that Mario Vasquez was not her abuser. Third, the Board's decision erroneously relied on a fact not supported by substantial evidence.

This Court should reverse the findings of the Board, remand Mr. Vasquez's claim, and order the Board to award the amount which will equitably compensate him pursuant to § 775.05(4).

ISSUES PRESENTED

1. Did the Board violate Statutory and Constitutional Due Process by precluding Mr. Vasquez from presenting affirmative evidence of his innocence in contravention of Wis. Stat. § 227.57?

   The Claims Board and Circuit Court did not address this issue.

2. Did the Board err by requiring the wrong standard for Mr. Vasquez to prove his innocence?

   The Circuit Court answered no. The Claims Board held that Mr. Vasquez did not establish his innocence.

3. Did the Board err by basing its decision on facts unsupported by substantial evidence?

   The Circuit Court answered no. The Claims Board based its decision on assertions made by the District Attorney.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the Claims Board precluded Mr. Vasquez from presenting evidence and because this Court need not defer to the legal conclusions of the Board, Mr. Vasquez requests oral argument, as it will provide post-briefing clarification of the facts and arguments presented in the parties' briefs. *See* Wis. Stat. § 809.22(2)(b); *see also Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

Given the dearth of published cases on compensation for wrongfully convicted individuals, Mr. Vasquez also requests publication of this Court's opinion. See Wis. Stat. § 809.23(a)1., 2., 5.

STATEMENT OF FACTS

A. The Sexual Assault Allegation and Investigation

In February 1998, a four-year-old girl, G.T., who lived at home with her parents, siblings, and Uncle Mario, complained of pain while urinating and, according to her mother, claimed that "Mario" had touched her at the babysitter's house. (6:7). Mr. Vasquez rented a room at the babysitter's house. Despite this allegation, G.T.'s mother brought her to the babysitter's house the next morning and never mentioned the alleged abuse to the babysitter. *Id*. Later at home, G.T.'s symptoms worsened, and she was taken to the hospital for treatment. *Id*. G.T. repeated to a nurse that "Mario" touched her. *Id*. A nurse swabbed G.T.'s sores to test for herpes, but a full sexual assault examination was not completed. *Id*. In subsequent interviews, G.T. made a wide range of statements including that "Mario" touched her with his fingers and penis, and that her uncle (whom she also referred to as "Mario") and her father both had inappropriately touched her. *Id*. After tests confirmed that G.T. had herpes, her mother took her to the police station where G.T., unprompted, stated "My uncle did not touch me." When asked about her contradicting statements, G.T. said "I don't remember. . .It's just Mario." (6:8).

These inconsistencies continued throughout subsequent interviews and questioning. In a videotaped interview with a social worker, G.T.'s

statements were further shown to be questionable as she repeatedly could not correctly distinguish between the truth and a lie. When faced with simple lies – that a monkey was a horse, that she was standing when she was sitting, that she was two instead of four – G.T. incorrectly insisted that all were true. (6:85-87). Despite not being able to establish G.T.'s veracity, the social worker continued questioning her. (6:87).

Throughout this interview, G.T. made other unusual statements. When asked who she lived with, G.T. first said "Mario," and when pressed, she once again unprompted stated "No, only my uncle who does not touch me, my uncle does not touch me." (6:82). When asked a question about human anatomy, G.T. responded with "Mario touched me and pushed me so hard and then told me to go." (6:89). Critically, the social worker never asked *who* Mario was in relation to G.T.

Because G.T. and her family only spoke Spanish, the social worker used a Spanish speaker to translate. Unlike best practices today, the translator had little knowledge of English and limited (if any) training in sensitive forensic interviews. (6:79). This led to errors in both the translation to Spanish and back to English. These issues became very apparent in the social worker interview where "certain questions and answers [were] summarized or embellished in [her] interpretation into Spanish or English." *Id*. In one

instance, the interpreter claimed G.T. said "Mario touched me," when, critically, the correct interpretation of G.T.'s answer would have been, "*my uncle touched me*." (6:90) (emphasis added). Later, G.T. described her uncle touching her after bathing, but instead of saying uncle, the interpreter translated "he." (6:93). The interpreter also reworded and repeated questions until there was a satisfactory answer from G.T., rather than directly interpreting what had been said. (6:49).

G.T.'s paternal uncle (who was referenced several times in the investigation) lived with G.T. and her family. (6:8).[2] In an interview with the police, the uncle admitted that his niece would often call him "Mario." *Id*. When questioned by the police about herpes, "Uncle Mario" stated that he had suffered from sores when in Mexico but denied having herpes. *Id*. In addition to G.T.'s statement to the police stating that "Uncle Mario" was currently abusing her in 1998, G.T. also told her mother the previous summer that "Uncle Mario" had inappropriately touched her. (6:9). Her mother refused to reach out to the police in response to that report. *Id.* G.T.'s mother told the babysitter about this allegation, and the babysitter subsequently received a threatening phone call from G.T.'s father. *Id*. Notably, G.T. also accused her father of abusing

[2] While G.T. has made several serious allegations of sexual abuse by her uncle over the years, he has never been prosecuted for these crimes. For privacy purposes, the Petitioner will refer to him as "Uncle Mario" throughout this briefing.

her; an allegation that G.T.'s mother took so seriously that she changed her work schedule to avoid leaving the father alone with G.T. or her siblings. (6:14).

Despite compelling reasons to believe that "Uncle Mario" was G.T.'s abuser, the police focused their limited investigation on Mr. Vasquez. Throughout the investigation, Mr. Vasquez was cooperative, even offering to undergo additional medical and DNA testing to prove his innocence. (6:10). The police not only failed to explore his innocence claim, but instead narrowed their investigation to Mr. Vasquez at the expense of any other suspects. For example, when presenting G.T. with a photo array, instead of asking G.T. to identify her abuser, they asked her to point to "Mario." (6:9). Unsurprisingly, G.T. – a four-year old – pointed to the picture of Mario Vasquez, the *only* Mario in the photo array. *Id*. "Uncle Mario" was never included in any photos shown to G.T. *Id*.

B. The Trial and Conviction

At trial, the State's main witness was four-year-old child G.T. Despite her continued difficulty distinguishing between a truth and a lie, she was allowed to testify. (6:9). G.T. never explicitly identified Mr. Vasquez as her abuser. In fact, G.T. *excluded* Mr. Vasquez in an exchange with the State, even though Mr. Vasquez was at counsel's table and fully visible to her:

Q: Is Mario in the courtroom?

A: No.
Q: Can you look around the courtroom, [G.T.]?
A: No.

(7:7). During cross-examination, G.T reiterated that her abuser was not present:

Q: Which one is Mario?
A: He's not here.

(*Id*. (quoting Trial Tr. 179)).

Mr. Vasquez's defense counsel was constitutionally ineffective. Despite promising to do so in opening statement, Mr. Vasquez's counsel never called a psychological expert to explain to the jury the facts of the case that raised significant doubts about the reliability of G.T.'s statements and testimony. (6:15). Defense counsel also failed to properly present G.T.'s "Uncle Mario" as a viable alternate suspect. Instead, the jury heard G.T.'s weak identifications of Mr. Vasquez as a "Mario," as well as unproven accusations that Mr. Vasquez might have had herpes, even though he tested negative in a swab test. (7:8). When called as a State witness, "Uncle Mario" denied under oath that he had herpes, and defense counsel failed to question him further or prove that this was a lie. (6:10). Mr. Vasquez was ultimately convicted and sentenced to twenty years in prison on November 16, 1998.

C. New Evidence and Ineffective Assistance of Counsel

A few months after Mr. Vasquez's conviction, a 31-year-old woman reported to police that she had contracted herpes from "Uncle Mario" during a sexually abusive encounter. (6:27-38). This information was never provided to Mr. Vasquez or his counsel. In 2002, Mr. Vasquez wrote to the police to request records for an appeal. *Id*. Upon receipt of that request, the police spoke to G.T. again. In that conversation, she picked Mr. Vasquez out of a photo array. She also again told police that "Uncle Mario" had inappropriately touched her and had been kicked out of the house for doing so. *Id*.

In 2014, with the Wisconsin Innocence Project now representing Mr. Vazquez, Dr. David W. Thompson was hired to provide his expert opinion regarding the reliability of G.T.'s accusation against Mr. Vasquez. After reviewing the statements and noting a high number of errors, he opined that, to a high degree of certainty, G.T.'s accusation was unreliable and likely influenced by a host of psychological factors, including misattributing Uncle Mario's actions to Mr. Vasquez. (6:43).

D. Conviction Vacated and Release

In 2014, Mr. Vasquez filed an original and supplemental post-conviction motion pursuant to Wis. Stat. § 974.06. Before the motion hearing, the District Attorney offered Mr. Vasquez a plea for immediate release, but Mr. Vasquez refused to plead guilty to a crime he did not commit. (6:11).

On January 29, 2015, the day before the motion hearing, the State interviewed G.T. She revealed that she had testified falsely that her uncle had not molested her. (6:12). She admitted that her uncle had sexually molested her in 1998 and that her father had sexually molested her throughout her childhood. *Id.* She also said they both had herpes. *Id.* The next day, at the hearing for the motion for a new trial, the District Attorney's office conceded that Mr. Vasquez was entitled to a new trial. The trial court, in accordance with the interest of justice, vacated Mr. Vasquez's conviction. (6:40). Tellingly, the District Attorney's office declined to retry the case. (6:12). Mr. Vasquez spent 16 years in prison before his exoneration.

E. Request for Compensation

In 2022, Mr. Vasquez filed a petition with the Board, seeking reimbursement for attorneys' fees and compensation for the 16 years he wrongfully spent in prison pursuant to Wis. Stat. § 775.05. (6:5-97). The Board heard Mr. Vasquez's petition on October 18, 2022. Prior to the hearing, the Board directed Mr. Vasquez to "not bring new information or documentation to the Claims Board meeting. Board members will not have time to consider new information." (7:19). In contrast, the Board invited the District Attorney to "present sworn testimony and whatever other evidence is essential to permit

the Board to decide the merits of the claim." (6:101). At the hearing, as per the Board's directive, Mr. Vasquez briefly summarized his claim, as did the District Attorney. (7:19). The Board asked just one question. *Id.*

On December 16, 2022, the Board released its decision. In the decision, the Board summarized the facts and arguments of both parties and issued a four-sentence decision denying Mr. Vasquez's claim for compensation, finding that he did not "present affirmative evidence of his innocence." (9:22). The Board gave particular weight to the Government's unsubstantiated claim about the victim's continued insistence that Mr. Vasquez was her abuser and concluded that the evidence was not clear and convincing that he was innocent. (9:22).

STANDARD OF REVIEW

Pursuant to Wis. Stat. § 775.05(1), "[t]he [C]laims [B]oard shall hear petitions for the relief of innocent persons who have been convicted of a crime." Upon petition and after hearing the evidence, the Board "shall find either that the evidence is clear and convincing that the petitioner was innocent of the crime . . . or that the evidence is not clear and convincing that he or she was innocent." Wis. Stat. § 775.05(3). However, "[t]he findings and the award of the [C]laims [B]oard shall be subject to review as provided in Ch. 227." Wis. Stat. § 775.05(5).

On appeal, this Court reviews the decision of the Claims Board *de novo*. *Turnpaugh v. State Claims Bd.*, 2012 WI App 72, ¶ 1, 342 Wis. 2d 182, 816 N.W.2d 920 (citing to *Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 46, 311 Wis.2d 579, 754 N.W.2d 95); *School Dist. v. School Dist. Boundary Appeal Bd.*, 201 Wis. 2d 109, 116, 548 N.W.2d 122, 126 (Ct. App. 1996).

Under Wis. Stat. Chapter 227, this Court should overturn an agency's decision if "the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." Wis. Stat. § 227.57(5). A court can overturn an agency's decision if the agency's finding of fact "is not supported by substantial evidence in the record." Wis. Stat. § 227.57(6).

If an agency action was dependent on fact finding at the proceeding, "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Wis. Stat. § 227.57(6). However, the court owes no deference to an administrative agency's conclusions of law. *Tetra Tech EC, Inc.* 2018 WI 75, ¶ 84.

ANALYSIS

I. The Claims Board's Procedures Precluded Mr. Vasquez From Presenting Affirmative Evidence of His Innocence in Contravention of Wis. Stat. 227.57, and the Due Process Clauses of the United States and Wisconsin Constitutions.

Due Process requires this Court to overturn the Board's decision. A "'fair trial in a fair tribunal is a basic requirement of due process'." *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 64 (citing to *In re Murchison*, 349 U.S. 133, 136 (1955)). "Procedural due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution protect against government actions that deprive an individual of life, liberty, or property without due process of the law." *Tetra Tech EC, Inc.,* 2018 WI 75, fn. 36 (citing *Adams v. Northland Equip. Co.*, 2014 WI 79, ¶64, 356 Wis. 2d 529).

The Board's denial of compensation must also be overturned on statutory grounds. If a court finds that the "fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procured," then that court "shall remand the case." Wis. Stat. § 227.57(4). If the Court "finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels

a particular action," then the court "shall set aside or modify the agency action" or remand the case. Wis. Stat. § 227.57(5).

The Board violated Mr. Vasquez's Statutory and Constitutional Due Process rights when it precluded him from presenting evidence of his innocence. In refusing to compensate Mr. Vasquez for the sixteen years he spent wrongfully incarcerated, the Board gave, as its only reason, that Mr. Vasquez "does not present affirmative evidence of innocence, particularly in light of the victim's continued insistence that he was her abuser." (9:23). Prior to the compensation hearing, the Board informed Mr. Vasquez that the hearing would be "brief and informal" and directed that he "not bring new information or documentation to the Claims Board meeting. Board members will not have time to consider new information." (7:19).

The Board's communication with the District Attorney was vastly different. In contrast to the directive sent to Mr. Vasquez, the Board instead invited the District Attorney to "present sworn testimony and whatever other evidence is essential to permit the Board to decide the merits of the claim." (6:101).

The Board further denied Mr. Vasquez's right to Due Process by failing to provide an impartial forum. Prior to the hearing, the Board communicated that the District Attorney was "in the best position to recommend the correct resolution of

this claim." *Id.* In essence, the Board privileged the District Attorney's position over Mr. Vasquez's in the compensation process.

In invalidating agency deference, the Wisconsin Supreme Court took issue with exactly the type of impartiality evinced by the Board here. In *Tetra Tech*, the court reinforced the values of Due Process in the agency process, holding "there cannot be a fair trial without a constitutionally acceptable decisionmaker: 'It is, of course, undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker.'" *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 64 (quoting *Guthrie v. WERC*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983)). Reiterating further, the court held that: "Our commitment to this principle is such that we do not accept even the appearance of bias." *Id.*

At minimum, the Board's procedures plainly invite the appearance of bias. Procedures that preclude a petitioner from presenting evidence—and paradoxically deny his claim for its lack thereof—but that invite evidence from the government, while privileging its position, violate the presumption of impartiality required under the Wisconsin and United States Constitutions. As in *Tetra Tech*, the Board's procedures here are "constitutionally unacceptable," and this Court should set aside its finding. *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 64 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

II. The Board's Decision Rests on an Erroneous Interpretation of Law.

A court shall set aside or modify an agency action if "the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." Wis. Stat. § 227.57(5). Mr. Vasquez, who is innocent as a matter of law, presented clear and convincing evidence of his innocence. Despite the plain language of the statute, the Board erroneously held Mr. Vasquez to a higher standard.

A. The Board Erroneously Required Mr. Vasquez to Prove His Innocence by a Higher Burden Than Required by Statute

The Board's decision rests on an erroneous interpretation of law. The Board held Mr. Vasquez to a higher standard than the clear and convincing standard required by Statute. Wis. Stat. § 775.05(3). In ruling against Mr. Vasquez, despite the weight of the evidence demonstrating his innocence, the Board failed to apply a clear convincing standard and instead impermissibly required Mr. Vasquez to prove his innocence beyond a reasonable doubt. That, however, is no longer the standard.

The burden on the part of the petitioner of proving innocence by "clear and convincing evidence" is expressly written in Wis. Stat. § 775.05(3). The Board violated the purpose of Wis.

Stat. § 775.05 when it used a beyond a reasonable doubt burden to assess Mr. Vasquez's claim. The legislature "carefully and precisely" crafted Wis. Stat. § 775.05 with the purpose that "our-criminal-justice system occasionally convicts innocent persons" and these individuals should be compensated. *Turnpaugh*, 2012 WI App 72, ¶ 3; *see Indus. to Indus. Inc. v. Hillsman Modular Molding, Inc.,* 2002 WI 51, ¶ 19 n.5, 252 Wis. 2d 544, 644 N.W.2d 236 ("We presume that the legislature 'carefully and precisely' chooses statutory language to express a desired meaning"); Wis. Stat. § 775.05. With this purpose in mind, the legislature intentionally chose to remove the "beyond a reasonable doubt burden" and replace it with the "clear and convincing" burden in 1979. Wis. Stat. § 775.05(3).

The legislature intentionally chose to replace the reasonable doubt standard because it recognized that a whole class of innocent petitioners, like Mr. Vasquez, would be unable to meet the burden through no fault of their own. *See Verdoljak v. Mosinee Paper Corp.*, 200 Wis.2d 624, 633, 547 N.W.2d 602 (1996). In many exonerations, proving innocence beyond a reasonable doubt might only be obtained with DNA evidence. Mr. Vasquez is not at fault for the State's failure to preserve DNA or biological evidence. That no such evidence exists does not erase the years that Mr. Vasquez spent

wrongfully incarcerated. Cases like his are precisely the reason the legislature lowered the burden for wrongfully convicted persons to obtain compensation.

B. Mr. Vasquez Established His Innocence by Clear and Convincing Evidence

Wis. Stat. § 775.05 requires that the petitioner show by clear and convincing evidence that he was innocent of the crime for which he was convicted, a reduction from the previous burden of beyond a reasonable doubt. *Contra LeFevre v. Goodland,* 247 Wis. 512, 516, 19 N.W.2d 884 (1945)

As the "middle burden," clear and convincing evidence is less than the beyond a reasonable doubt standard seen at trial; a guess is not enough, and "absolute certainty" is not required. *See* Wis JI—Civil 205 (2022). This is for good reason, as in many cases absolute certainty might only be obtained with DNA evidence—evidence that Mr. Vasquez did not have access to through no fault of his own. That cannot be, and is not, the standard. Instead, what Mr. Vasquez must do is establish evidence of innocence, "that when weighed against that opposed to it clearly has more convincing power." *Id*. Not only has Mr. Vasquez established his innocence, he has done so by presenting a record of credible evidence that answers two important questions that are prominent in any wrongful conviction: the who and

the why. In opposition, the District Attorney provided only an unsubstantiated and uncorroborated assertion.

First, it is worth noting that Mr. Vasquez comes before this Court an innocent man. While the State asserts that, in dismissing Mr. Vasquez's conviction, that it "remained satisfied that the defendant was not an innocent man," (7:104), the District Attorney's opinion does not govern. The law does. As the Wisconsin Supreme Court has explained: "when a judgment has been vacated, 'the matter stands precisely as if there had been no judgment,' and that vacating a judgment renders it 'nullified and no longer in effect.'" *State v. Braunschweig*, 2018 WI 113, ¶ 21, 384 Wis.2d 742, 885 N.W.2d 89 (quoting *State v. Lamar*, 2011 WI 50, ¶¶39-40, 334 Wis. 2d 536). Simply put, "[v]acatur invalidates the conviction itself." *Id.* at ¶ 22. Mr. Vasquez thus stands innocent unless proven guilty, a principle which the Wisconsin Supreme Court has emphasized "… is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *State v. Lynch*, 2016 WI 66, ¶ 68, 371 Wis. 2d 1, 885 N.W.2d 89.

Second, as to the actual perpetrator, Mr. Vasquez introduced evidence that identifies the actual perpetrator: G.T.'s live-in uncle, who she called Mario. "Uncle Mario" had a greater

opportunity to commit this crime, as he lived with G.T.'s family and had access to her. (6:7). Throughout the investigation, G.T. identified "Uncle Mario" as her abuser, including in an interview with a social worker where she described "mi tio" [my uncle] touching her. (6:90). Instead of translating that line correctly, the interpreter said "he" instead of "my uncle." *Id*. When asked where Mario touched her, she responded "My uncle finished bathing … and that was when he touched me with his 'cola.'" (6:93).[3] These constant references to her uncle when questioned about her abuse make it clear that identifications of "Mario" as her abuser were in reference to her uncle, not Mr. Vasquez.

Mr. Vasquez also presented credible evidence of "Uncle Mario's" history of sexual abuse allegations. Unlike Mr. Vasquez, who had no prior or subsequent history of violent or abusive behavior, "Uncle Mario" had a propensity for sexual abuse that pre-dated and post-dated G.T.'s herpes diagnosis. First, in the summer *before* February 1998, G.T. disclosed to her mother that "Uncle Mario" inappropriately touched her. (6:9). G.T.'s mother shared this information with the babysitter, who was subsequently threatened by G.T.'s father, "Uncle Mario's" brother, to keep this quiet. *Id*. Then in 2002, G.T. confirmed that "Uncle Mario" had continued to inappropriately touch her, and he was

[3] Although G.T. never clearly defines what "cola" means, the translator explains that it means "tail" or "something that hangs." (6:91).

kicked out of the family home. (6:10). In 2015, G.T. confirmed that her uncle was in fact sexually abusing her in 1998 (6:12). Mr. Vasquez, in contrast, has no history of sexual, violent, or abusive behavior. That G.T. continued to report being sexually assaulted even after Mr. Vasquez's incarceration, further highlights the fact that he was not the perpetrator.

Mr. Vasquez also presented evidence that G.T. was not the only victim of "Uncle Mario" and that her uncle, contrary to his testimony at trial, did have an active case of herpes. In a 1999 police report, a woman reported to the police that she had contracted herpes from "Uncle Mario" during a sexually abusive encounter. (6:27). This information was crucial as it meant that "Uncle Mario" likely perjured himself at trial when he denied having herpes—a critical lie given G.T.'s diagnosis (6:14,104).[4] The police undoubtedly understood the importance of this disclosure, as the Detective explained to the woman that he had worked on a sexual assault involving a four-year-old child that happened to be the niece of the male involved in her case. (6:27). Yet this information was not disclosed to Mr. Vasquez until years later when the Wisconsin Innocence Project obtained them.

[4] At trial, a doctor testified that Mr. Vasquez's healing lesions were consistent with him having had the herpes virus, (6:104), however the laboratory results showed that he tested negative for herpes. (6:8).

When considering the evidence against Mr. Vasquez compared to "Uncle Mario" side by side, it becomes undeniably clear that "Uncle Mario" is the "Mario" who assaulted G.T.

	Uncle Mario	**Mario Vasquez**
Previous Allegations Abuse of G.T.	Yes	No
Subsequent Allegations of Abuse to G.T.	Yes	No
Access to G.T.	Yes-lived with her	Limited contact
Sexual Abuse Allegations of Others	Yes	No
Herpes	Passed herpes to an adult victim in 1998	Tested negative for trial in 1998
Dishonesty about herpes	Yes—denied at trial	No—admitted to previous lesions, requested more testing

This evidence presented by Mr. Vasquez illustrating his innocence, when weighed against the evidence opposed "clearly has more convincing power." Wis JI—Civil 205 (2022).

Finally, Mr. Vasquez not only presented evidence of a more likely suspect, but he also presented evidence that explains why he was falsely

accused of this crime: the inappropriate investigation and questioning of G.T. led to statements that were manipulated, suggestive, and unreliable. To support this, Mr. Vasquez presented a report by Dr. David W. Thompson, Clinical and Forensic Psychologist, who found multiple factors that "raise significant questions about the accuracy and reliability of the information provided by the child" and ultimately concluded, to a high degree of certainty, that her statements were unreliable. (6:54). The Wisconsin Supreme Court has recognized that expert testimony on the reliability of child witness statements is admissible and necessary, noting the "concern . . . that persons conducting interviews with the child will, either inadvertently or purposefully, suggest facts and promote fantasies that the child will later 'remember' and testify to as the truth." *State v. Kirschbaum*, 195 Wis. 2d 11, 24, 535 N.W.2d 462 (1995).

Unbeknownst to the jury, G.T.'s interviews were wrought with bias and suggestive techniques that led to inaccurate reports. As the District Attorney candidly admitted at the hearing, a forensic interview of G.T. now would look very different than it did in 1998. (10 (Recording at 19:50)). Numerous questionable interview techniques were used that call into question her statement. For example, Dr. Thompson found that G.T.'s interviews contained suggestive yes/no multiple choice and leading questions which have

been associated with producing inaccurate reports from children. (6:50). The interviewer seemed to recognize this problem noting "I don't think we're going to be able to establish [whether G.T. can distinguish the truth]," but still inexplicably determined it was appropriate to "[k]eep going" with a child who clearly had difficulties distinguishing between truth and fabrications. (6:43,87).[5]

Most importantly, Dr. Thompson found G.T.'s statements may have been inaccurate because of source misattribution error, where memory is linked with an incorrect source. (6:43). In G.T.'s initial interview, she volunteered that she experienced sexual contact from her father and "Uncle Mario." Dr. Thompson found: "given the number of times [G.T.] previously reported being 'touched' that she may have conflated the details of the previous events with the events in early February." (6:44). Notably, Dr. Thompson concluded that source misattribution error be considered in the context of the previous indications that she may have been previously abused by her uncle. (6:44).

Indeed, it is entirely possible that G.T. experienced sexual contact with her father and uncle and misreported her recollection due to a source misattribution error. Additionally, the fact that G.T. referred to her uncle as "Mario" presented "strong direct evidence of G.T.'s vulnerability" to source

[5] During the interview, the social worker said: "The truth, huh? I don't think we're going to be able to establish that. We'll ask questions, though. Keep going." (6:87).

misattribution errors. (6:46). He continued to note that research demonstrates that children who experience source misattribution "are fully convinced their memory is accurate" and "the more times the child repeats the story, the more it will be cemented in their memory as a true fact." (6:47).

In support of Dr. Thompson's report, Mr. Vasquez also submitted as evidence a translation of G.T.'s interview that illustrates the problematic questioning. These documents confirm the many ways G.T. was subjected to external influence and inappropriate interview techniques that call into question her testimony at the time, and her beliefs now. These documents give a clear explanation of why Mr. Vasquez was falsely accused of this crime: a vulnerable four-year old child who was subjected to external influences and inappropriate interview techniques that call into question her accusation.

Having answered the who and the why questions, it is clear that the evidence presented by Mr. Vasquez, when compared against the evidence in opposition, has more convincing power. The Board erroneously weighed the uncorroborated hearsay claim of the District Attorney against Mr. Vasquez's credible record of evidence. In ruling against Mr. Vasquez, the Board repeated a claim made in the District Attorney's letter that G.T. has maintained that she was assaulted by Mr. Vasquez. (6:104). As discussed at length below, not only was the District Attorney's claim about G.T. uncorroborated, but the

claim was inconsistent with the facts presented at trial and the subsequent evidence presented by Mr. Vasquez: there is no evidence that G.T. maintained that Mr. Vasquez was her assailant.

However, even if there was evidence of G.T.'s continued insistence, Mr. Vasquez has still met the clear and convincing burden as a recantation from a victim is not a requirement under the Board's own precedent. In the Claims Board Precedent Log, several cases illustrate this phenomenon. In the Darryl Holloway claim, the Board found clear and convincing evidence of innocence despite one of the victim's insistence that Holloway was her attacker. (7:31). In the David Sanders case, the victim identified David Sanders as the "Brother David" who abused him; years later, the true perpetrator, another "Brother David," was identified and eventually confessed. (7:69). In both cases, the petitioners were compensated notwithstanding the lack of victim recantation.

Mr. Vasquez has similarly identified the perpetrator: "Uncle Mario," who was known to G.T., had access to her, had a previous history of abusive behavior, and had herpes at the time.

As such, the Board's decision that Mr. Vasquez failed to show his innocence was an erroneous interpretation of the law, and this Court should set aside its determination.

III. The Claims Board's Decision Depended on a Finding of Fact Unsupported by Substantial Evidence in the Record.

When reviewing an agency decision, this Court must set aside or remand the case "if it finds that the agency's action depends on any finding of fact that is not supported by *substantial evidence* in the record." Wis. Stat. § 227.57(6) (emphasis added). Substantial evidence requires: "the quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion." *De Gayner & Co., Inc. v. Dep't of Natural Res.*, 70 Wis. 2d 936, 940, 236 N.W.2d 217 (1975); *see also Gateway City Transfer Co. v. Public Service Comm.*, 253 Wis. 397, 34 N. W. 2d 238 (1948). This Court must search the record to locate credible evidence that supports the agency's decision. *Brakebush Bros., Inc. v. Labor & Indus. Review Comm'n*, 210 Wis. 2d 623, 630, 563 N.W.2d 512 (1997). A court may overturn an agency's final determination if "the agency's finding of fact 'is not supported by substantial evidence in the record.'" *Turnpaugh,* 2012 WI App 72, ¶ 4 (citing Wis. Stat. § 227.57(6)).

As a starting point, the Board's decision is limited in both reasoning and analysis. The Board's Decision includes a background of Mr. Vasquez's request, summaries of both Mr. Vasquez's and the District Attorney's "facts and arguments," and ends with an ultimate discussion and conclusion. (9:20-24). The "Discussion and Conclusion" section spans

a mere four sentences, one of which re-states the standard. The Board then makes precisely one finding of fact, concluding that Mr. Vasquez did not "present affirmative evidence of innocence, *particularly in light of the victim's continued insistence that he was her abuser*." (9:23) (emphasis added). For that assertion, the Board presumably relies on a line in the District Attorney's written letter, also argued at the hearing, that stated: "[W]hat the defendant ignores is that throughout her contact with our office, the crime victim consistently maintained that she was in fact sexually assaulted by Mario Victoria-Vazquez [sic] in addition to other men." (6:104). However, the District Attorney did not provide any evidence to corroborate this claim, despite repeated opportunities to do so. The claim further fails to appreciate or accept that, throughout the investigation, the trial, or the subsequent litigation, G.T. never consistently identified Mr. Vasquez. Most notably, at trial, G.T. testified under oath that the "Mario" who abused her was not in the courtroom.

It is well-established that what a lawyer says is not evidence. *Kenwood Equipment Inc., v. Aetna Insurance Co.*, 48 Wis. 2d 472, 481, 180 N.W.2d 750 (1970). In fact, in both civil and criminal cases, jurors are admonished that "remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." *See* Wis JI—Criminal 160 (2022); Wis

JI—Civil 110 (2022); *see also* Wis JI—Criminal 157 (2022). The District Attorney did not elicit testimony from the victim at the Board hearing, despite being invited to present testimony. (6:101). The District Attorney did not submit any affidavits from the victim in its letter to the Board despite being invited to submit exhibits and attachments. *Id.* Nor did the District Attorney cite any prior record to substantiate its claim, because no such record exists: no statement was introduced at the Board hearing, in the briefing, or even at the hearing for Mr. Vasquez's new trial. (6:103). There simply was not any substantial evidence to support the Board's sole finding of fact.

That alone warrants reversal of the Board's decision. But even if this Court determines that the District Attorney's written and oral remarks are evidence given the relaxed evidentiary standards, these remarks still do not and cannot constitute substantial evidence. While the Board is not bound by formal rules of evidence and must admit any *testimony* having "reasonable probative value," Wis. Stat. § 16.007(2), "uncorroborated hearsay alone does not constitute substantial evidence in administrative hearings." *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16, ¶ 81, 278 Wis. 2d 111, 921 N.W.2d 199; *see also Menomonee Falls v. Wisconsin Dep't of Natural Resources*, 140 Wis. 2d 579, 610, 412 N.W.2d 505, (1987) (reiterating that "administrative bodies should never ground administrative findings

upon uncorroborated hearsay"). The purpose of this rule is to balance concerns of "administrative expediency and fundamental fairness." *Gehin*, 2005 WI 16, ¶ 81.

Before the Board hearing, while both sides had the opportunity to submit evidence to support their position, only the State was encouraged to bring additional evidence and elicit testimony at the hearing. (6:101). In stark contrast to the Board's instructions that Mr. Vasquez *not* present new information or witnesses to the hearing, the Board affirmatively encouraged the District Attorney to submit attachments or exhibits "[i]f you are aware of facts that are not clearly stated in this claim, which are relevant to the action that should be taken." (6:101). The Board further invited the District Attorney "to present sworn testimony and whatever other evidence is essential to permit the Board to decide the merits of the case." *Id*. Despite this encouragement to present sworn testimony or other evidence to support their assertion, the District Attorney merely submitted a letter stating its position. (6:103-105). Thus, the District Attorney's statement – not testimony – that G.T. has "consistently maintained" that Mr. Vasquez was her assailant is uncorroborated hearsay and cannot constitute substantial evidence in an administrative hearing. *Gehin*, 2005 WI 16, ¶ 81.

For these reasons, the only factual finding that the Board made – that G.T. continues to insist

that Vasquez was her abuser – is not supported by substantial, or any, evidence in the record. Because the Board's denial[6] of the claim depends on this unsupported and uncorroborated fact, Mr. Vasquez requests this Court to set aside the Board's action and remand to the Board for a determination of the amount that would adequately compensate Mr. Vasquez for his wrongful imprisonment.

CONCLUSION

Pursuant to Wis. Stat. § 775.05, Mr. Vasquez petitioned the Claims Board for Compensation for the sixteen years he spent wrongfully convicted. Because (1) the Board's procedures violated Due Process, (2) because the Board erred in concluding that there was not clear and convincing evidence Mr. Vasquez was innocent, and (3) because the Board's decision depended on a finding of fact not supported by substantial evidence, its decision should be reversed and remanded to determine the amount which will "equitably compensate" Mr. Vasquez under the guidelines set forth in Wis. Stat. § 775.05(4). In the alternative, if this Court finds that additional fact-finding is necessary, this Court should reverse and remand to the Board and direct that additional fact-finding be completed.

[6] For its part, the Circuit Court declined to decide whether the District Attorney's assertion constituted substantial evidence, stating that it "does not believe it needs to reach the dispute over the Claim Board's reference to G.T.'s statement through the District Attorney" because G.T. never recanted her story. As noted *supra* G.T.'s story at trial indicates that her Uncle Mario, and not Mr. Vasquez, was her assailant.

Dated this 28th Day of January 2024.

Electronically Signed
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (b)(m), and (c) for a brief. The length of this brief is 6,708 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of

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