STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2023AP001764

MARIO VICTORIA VASQUEZ,

Petitioner-Appellant,

v.

STATE OF WISCONSIN CLAIMS BOARD,

Respondent-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

REPLY BRIEF OF PETITIONER-APPELLANT

Christopher Lau
Bar No. 1126887
WISCONSIN INNOCENCE PROJECT
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 264-1354

Demetri Sweat
Law in Action Fellow

Judith Cusack
Kasim Rana
Clinical Law Students

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In his opening brief, Mario Vasquez demonstrated that the Claims Board ("the Board") erred: (1) by ignoring clear and convincing evidence of his innocence and instead applied a higher standard; (2) by relying on findings of fact unsupported by substantial evidence; and (3) by violating Mr. Vasquez's rights to procedural due process.

The State has conceded, via its silence, two determinative arguments made by Mr. Vasquez;

1. That Mr. Vasquez presented direct, clear and convincing evidence of his innocence through the sworn testimony of G.T. that Mario Vasquez was not the Mario who assaulted her;

At trial the State asked G.T. to identify the man who sexually assaulted her:

> 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)).

The victim's sworn testimony that the State had the wrong man on trial is clear and convincing proof of innocence.

2. That Mario Vasquez appeared before the Board an innocent man as his judgment of conviction had been vacated. The State asks this Court to accept as evidence the post-trial, unsworn, out-of-court statements of the District Attorney that G.T. has not recanted her pre-trial statement(s). The District Attorney's impressions are not evidence and are improper hearsay that does not counter the direct evidence offered by G.T. at trial that Mario Vasquez was not the Mario who sexually assaulted her.

The Board received no evidence at the hearing contesting Mario Vasquez's innocence. See, *State v. Braunschweig*, 2018 WI 113, ¶ 21, ¶22 384 Wis.2d 742, 885 N.W.2d 89. Because the State failed to respond to Mr. Vasquez's arguments regarding his innocence, they should be deemed conceded. *See Schlieper v. State Dep't of Nat. Res.,* 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994)("respondents cannot complain if propositions of appellants are taken as confessed which respondents do not undertake to refute").

ARGUMENT

I. Mr. Vasquez Provided Clear and Convincing Evidence of His Innocence

G.T.'s sworn testimony at trial is clear and convincing evidence of Mario Vasquez's innocence. The State argues that Mr. Vasquez did not meet his burden because he did not "provide[] direct evidence that he was not the perpetrator of the crime." (Opp'n 14). Mario Vasquez did provide direct evidence of his innocence to the Board through G.T.'s testimony that Mario Vasquez did not sexually assault her. The State argues that Mr. Vasquez cannot prevail before this Court as he did not obtain a recantation from the victim. (Opp'n 9). No recantation is required or available from G.T. as she testified under oath that Mario Vasquez was not the person who assaulted her. The clear and convincing evidence of Mr. Vasquez's innocence is the sworn testimony of G.T. *See* Wis JI—Civil 205 (2022).

In *Turnpaugh v. State Claims Bd.,* 2012 WI App 72. Turnpaugh's conviction was overturned on appeal as there was no evidence that he committed the crime he was accused of. *Id*. at ¶ 2. Turnpaugh sought compensation from the Claims Board. The Board imposed the same insurmountable hurdle of proof against Turnpaugh that it has imposed against Mr. Vasquez in this case when it found that Turnpaugh had not presented clear and convincing evidence that he was innocent of the crime for which

he was convicted. *Id.* at ¶ 2; *see also* R2:66). This court reversed the Board's conclusion as it was "wholly unreasonable" of the Board to impose such a burden upon Turnpaugh to prove his innocence when this court had already found, via the appeals process, that no crime had been committed. *Id.* at ¶ 6.

The Board imposed the same impossible burden upon Mario Vasquez. The victim testified under oath that the State had the wrong Mario and the court ultimately vacated Mr. Vasquez's conviction. (6:40. When Mr. Vasquez appeared before the Claims Board he stood before the Board as an innocent man with the added proof that the State had wrongfully prosecuted him instead of G.T.'s uncle Mario.

The State attempts to offer impermissible hearsay evidence of the District Attorney to counter Mr. Vasquez's innocence. The State's assertions present two problems. First, the District Attorney's out-of-court, unsworn, hearsay statement as to what G.T. told him is countered by G.T.'s sworn testimony that the District Attorney prosecuted the wrong man. Second, the District Attorney's explanation as to why he did not re-try Mario Vasquez cannot be evidence of Mr. Vasquez's guilt.[1] The foundational

[1] The district attorney's decision to not re-try Mr. Vasquez is understandable as he would have had to put G.T. on the witness stand knowing that G.T. had already testified under oath that Mario Vasquez was not the Mario who assaulted her.

fact is that G.T. testified that Mr. Vasquez was not the person who assaulted her. The evidence presented to the Board that the State tried the wrong man is clear and convincing evidence of Mario Vasquez's innocence.

The State's singular focus on its assertion that Mario Vasquez needed to provide proof that G.T. "recanted" her assertion is nonsensical as G.T.'s sworn testimony was that Mario Vasquez did not assault her. The State is the party who needed to provide proof to the Claims Board that G.T. lied at trial. The State offered none. G.T. clearly testified under oath at trial that the man who assaulted her was not the man sitting at the defense table. (6:90, 93). During the State's direct examination of G.T., the State asked G.T.:

> 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)).

Before trial, G.T. repeatedly told investigators that her "Uncle Mario" assaulted her, and told a social worker that her "tio" (uncle)

assaulted her. (6:7). G.T.'s mother also previously told police that G.T.'s Uncle Mario sexually assaulted G.T. (6:9). The State's tunnel vision ignored G.T.'s statements as well as physical evidence offered by Mario Vasquez and the physical evidence they could have obtained from Uncle Mario which would have showed that he was the source of the herpes transmitted to G.T. (6:27-38). The State blindly put Mario Vasquez on trial for a crime that had they performed even a cursory investigation would have informed them not to do so.

The District Attorney argues that he decided not to re-try Mario Vasquez because Mr. Vasquez already served 16 years in prison. The fact is the State could not re-try a man who the victim has already testified under oath was not the man who sexually assaulted her and who had told the State prior to trial that the Mario who had assaulted her was her uncle Mario.

Neither the Board nor the State acknowledge Mr. Vasquez's presumption of innocence. "[W]hen 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). Mr. Vasquez stood before the Claims Board,

and stands before this Court, as an innocent man under the eyes of the law. *See Id.* at ¶ 22.

Rather than reckon with Mr. Vasquez's presumption of innocence, the State attempts to sway this Court by impugning Mr. Vasquez's conduct during his wrongful incarceration. (Opp'n *fn.* 3); *See* Wis. Stat. § 904.04; *State v. Muckerheide*, 2007 WI 5, ¶ 29, 298 Wis. 2d 553, 569, 725 N.W.2d 930, 938 ("it is universally established that evidence of other acts "is not admitted in evidence for the purpose of proving general character, criminal propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, is not legally or logically relevant to the crime charged."). The character assassination of a man who wrongfully spent sixteen years in confinement because of the State's failure can only be seen as an attempt by the State to cover up its wrongful conviction of an innocent man.

Proper consideration of Mr. Vasquez's presumption of innocence, G.T.'s direct testimony that Mario Vasquez was not the man who sexually assaulted her, and the proof against Uncle Mario, compels a finding that Mr. Vasquez's evidence was "clearly more convincing" than the District Attorney's unsubstantiated insistence in Mr. Vasquez's guilt. *See* Wis. JI—Civil 205 (2022).

II. The Substantial Evidence Test Applies.

The State argues that the "substantial evidence" test required by § 227.57(6) does not apply to the Board's review. (Opp'n 22). The State ignores appellate precedent. In *Turnpaugh v. State Claims Bd.*, the Court held that a court may overturn an agency determination if "'the agency's finding of fact 'is not supported by substantial evidence in the record.'" 2012 WI App 72, ¶ 4, 342 Wis. 2d 182, 816 N.W.2d 920 (citing Wis. Stat. § 227.57(6)). More recently, in *Sanders v. State Claims Bd.*, 2023 WI 60, ¶ 28, 408 Wis. 2d 370, 385, 992 N.W.2d 126, 134, the court held that "[a] "finding of fact" is capable of being reviewed on appeal to determine whether "substantial evidence in the record" supports its validity." *Id.* ¶ 29 (citing Wis. Stat. § 227.57(6)).

The State also mischaracterizes Mr. Vasquez's argument under *Gehin v. Wisconsin Group Insurance Board,* 2005 WI 16, 278 Wis. 2d 111, 629 N.W.2d 572. *Gehin* stands for the ""long-standing rule in Wisconsin that uncorroborated hearsay alone does not constitute substantial evidence." *Gehin*, 2005 WI 16, ¶ 8. Here, the Board's sole finding of fact depended on the District Attorney's uncorroborated hearsay assertion that G.T. continued to insist on Mr. Vasquez's guilt. (6:104). There was, and is, zero evidence to corroborate that assertion and a lawyer's assertions

are not evidence. *See Kenwood Equipment Inc., v. Aetna Insurance Co.*, 48 Wis. 2d 472, 481, 180 N.W.2d 750 (1970); Wis. JI—Criminal 160 (2022); Wis. 34 JI—Civil 110 (2022); *see also* Wis. JI—Criminal 157 (2022). The only evidence that was properly before the Board and this court is G.T.'s sworn testimony at trial that the State had the wrong Mario.

III. This Court Has the Authority to Address the Claims Board's Due Process Issues

This Court can and should review the Due Process issues that afflict the Claims Board's procedures. The State argues that the claim is forfeited because of the court's holding in *Townsend v. Massey*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155. The State is correct that *Townsend* found that the respondents forfeited certain issues by not raising them below but *Townsend* also held that the forfeiture rule is one of judicial administration, and appellate courts have the authority to ignore forfeiture when a case presents an important recurring issue." *Id.* ¶ 23; *see also id.* ("we have the discretion to address arguments raised for the first time on appeal.").

The Due Process issue in this case presents an important recurring issue. The Claims Board has enacted procedural rules that prevent it from functioning as an impartial decisionmaker. *See*

Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 2018 WI 75, ¶ 64 (citing to *In re Murchison*, 349 U.S. 133, 136 (1955)) ("A "'fair trial in a fair tribunal is a basic requirement of due process'."). The Board encourages and allows the Government to submit uncorroborated hearsay evidence (6:101) but correspondingly and expressly instructs applicants to "not bring new information or documentation to the Claims Board meeting." (7:19). The Claim's Board allows the State to bring before it unsworn hearsay evidence from the District Attorney as to what the District Attorney asserts G.T. recently told him but denies Mr. Vasquez from offering any "new information or documentation to the Claims Board." *Id.* It is not a fair tribunal that allows one side to present evidence but denies that right to the other side.

In *Tetra Tech EC, Inc.*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, the Court reaffirmed the importance of Due Process in agency procedures and held that "It is, of course, undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker."' *Id.* ¶ 64 (quoting *Guthrie v. WERC*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983)). The Court further affirmed that even the appearance of bias violates Due Process. *See id.*

The Board's disparate treatment of the parties—privileging the Government's views while simultaneously restricting an applicant's ability to present evidence evinces such bias. Mario Vasquez

had a due process right to a fair hearing that was denied to him and unless addressed by this Court will be denied to future applicants.

CONCLUSION

This Court should reverse the Board's decision and remand to the Claims Board to determine the amount which will "equitably compensate" Mr. Vasquez under the guidelines set forth in Wis. Stat. § 775.05(4).

Dated this 20th day of May, 2024.

Electronically Signed
by Christopher Lau

Christopher Lau
State Bar No. 1126887

Demetri Sweat
Law in Action Fellow

Judith Cusack
Kasim Rana
Clinical Law Students

WISCONSIN INNOCENCE PROJECT
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-3646
christopher.lau@wisc.edu

Attorneys for Petitioner-Appellant Mario Vasquez

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 2,131 words.

Dated this 20th day of May, 2024.

Electronically Signed
by Christopher Lau

Christopher Lau
State Bar No. 1126887