

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

**RECEIVED**

OCT 01 2021

CLERK OF COURT OF APPEALS  
OF WISCONSIN

DERRICK A. SANDERS,  
Petitioner-Appellant,

v.

Appl. No. 21-AP-373

L.C.: 2020-CV-1016

State of  
WISCONSIN CLAIMS BOARD,  
Respondent-Respondent.

APPEAL FROM THE CIRCUIT COURT DECISION AND ORDER ON  
PETITION FOR JUDICIAL REVIEW, BEFORE THE HONORABLE  
STEPHEN E. EHLKE, PRESIDING.

APPEAL FROM PART OF THE FINAL DECISION, ENTERED ON  
FEBRUARY 12, 2020, BEFORE THE WIS. CLAIMS BOARD, PRESIDING.

APPEAL FROM THE WHOLE DECISION, ENTERED ON MARCH 31, 2020,  
BEFORE THE WIS. CLAIMS BOARD, PRESIDING.

BRIEF AND APPENDIX  
OF PETITIONER-APPELLANT DERRICK A. SANDERS

Submitted by:

Derrick A. Sanders  
2803 Riverside Parkway Apt 5401  
Grand Prairie, TX 75050  
Phone No. (219) 801-0688

Pro Se-Appellant

TABLE OF CONTENTS	page
TABLE OF AUTHORITIES.....	i
STATEMENT OF THE ISSUES.....	iii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	iv
A. Statement of the Case.....	v
B. Procedural Status of Case.....	v
C. Disposition Below.....	vii
STATEMENT OF THE FACTS.....	viii
ARGUMENT.....	1
I. THE CIRCUIT COURT ABUSED ITS DISCRETION AND ERRED IN SEVERAL RESPECTS IN DENYING MR. SANDERS PETITION FOR REVIEW OF THE CLAIMS BOARDS DECISIONS.....	1
A. Whether the Remedy Under Wis. Stats. § 775.05 Conform to the Due Process Requirements of the 14th Amendment to the United States Constitution, when the Wis. Claims Bd. Ignore A Claimant Request for Additional Compensation, Without a Rational Basis or Explanation, Thereby Constructively Imposing the Loss of the Right to File Suit Against the State, Under Wis. Stats. § 775.01 and § 775.05?.....	1
B. Whether the Claims Board Decision to Ignore Mr. Sanders Claim For Additional Compensation, Deprived Mr. Sanders of His First Amendment Constitutional Right of Access to The Court, Under Wis. Stats. § 775.01 and § 775.05?.....	5
C. What Is The Proper Standard to Be Utilized In Reviewing An Agency Decision Which Deviates From The Agency Prior Practice? And, In Utilizing The Proper Standard, Did The Claims Board Deviate From That Prior Practice, When It Failed To Address The Claim And/Or Explain Its Reasoning In Not Forwarding the Claim to The Legislature?.....	6
D. Whether Mr. Sanders Was Prejudiced By the Claims Board, By Not Being Informed of The Ex Parte Communication With A Party Litigant On A Issue Before the Board Concerning The Additional Compensation Claim?.....	10
CONCLUSION.....	14
APPENDIX.....	16

## TABLE OF AUTHORITIES

## Wisconsin Cases

<u>Barron Elec. Co-op v. Public Serv. Comm'n of Wis.,</u> 212 Wis.2d 752, 569 N.W.2d 726 (Ct.App.1997).....	9,
<u>Kammes v. Mining Inv. &amp; Local Impact Fund Bd.,</u> 115 Wis.2d 144, 340 N.W.2d 206 (Ct.App.1983).....	11
<u>McCleary v. State,</u> 49 Wis.2d 263, 182 N.W.2d 512 (1971).....	10
<u>Olsen v. Rothwell,</u> 28 Wis.2d 233, 137 N.W.2d 86 (1965).....	9
<u>Public Serv. Corp. v. Public Serv. Comm.,</u> 109 Wis.2d 256, 325 N.W.2d 867 (1982).....	8,9,10
<u>Reidinger v. Optometry Exam Bd.,</u> 81 Wis.2d 297, 260 N.W.2d 270 (1977).....	10
<u>Robertson Transp. Co., v. Public Serv. Comm.,</u> 39 Wis.2d 653, 159 N.W.2d 636 (1968).....	9
<u>State ex rel. Anderson-El v. Cooke,</u> 234 Wis.2d 626, 610 N.W.2d 821, 2000 WI 40 (2000).....	15
<u>State ex rel. Irby v. Israel,</u> 100 Wis.2d 411, 302 N.W.2d 517 (Ct.App.1981).....	15
<u>State ex rel. Jones v. Franklin,</u> 151 Wis.2d 419, 444 N.W.2d 738 (Ct.App.1989).....	15
<u>State ex rel. Meeks v. Gagnon,</u> 95 Wis.2d 115, 289 N.W.2d 357 (Ct.App.1981).....	15
<u>State v. Hutnik,</u> 39 Wis.2d 754, 159 N.W.2d 733 (1968).....	10
<u>Stoughton Trailors, Inc. v. L.I.R.C.,</u> 2006 WI App 157, 295 Wis.2d 750, 721 N.W.2d 102.....	8

## Federal Cases

<u>Allen v. Duckworth,</u> 6 F.3d 458 (7th Cir.1993).....	3
<u>Bell v. City of Milwaukee,</u> 746 F.2d 1205 (7th Cir.1984).....	5
<u>Davis v. Milwaukee County,</u> 225 F.Supp.2d 967 (E.D.Wis.2002).....	7

<u>Weis v. Bd. of Regents of Univ. of Wis. System,</u> 837 F.Supp.2d 971 (E.D.Wis.2011).....	2,4,6,7
---	---------

#### U.S. Supreme Court Cases

<u>Bill Johnsons Resturant, Inc. v. N.L.R.B.,</u> 461 U.S. 731, 103 S.Ct. 2161 (1983).....	5,7
<u>Cox v. Louisiana,</u> 379 U.S. 559 (1965).....	3
<u>Evitts v. Lucey,</u> 469 U.S. 387 (1985).....	3
<u>Lewis v. Casey,</u> 518 U.S. 343 (1996).....	8
<u>Raley v. Ohio,</u> 360 U.S. 423 (1959).....	3
<u>Unisted States v. Cacers,</u> 440 U.S. 741 (1979).....	3,5

#### Wisconsin Statutes

Wis. Stats. § 16.007.....	15
Wis. Stats. § 16.007(2).....	14
Wis. Stats. § 227.57(8).....	9,11
Wis. Stats. § 775.01.....	1,2,4,6,7
Wis. Stats. § 775.05.....	1-6,10,11,15
Wis. Stats. § 775.05(1).....	2,7
Wis. Stats. § 775.05(2-4).....	2,4
Wis. Stats. § 775.05(4).....	4,6,11

#### Constitutional Statutes

1st Amendment to U.S. Constitution.....	6,7
14th Amendment to the U.S. Constitution.....	1,3,5

#### Other Authorities

<u>Chatham v. Adcock,</u> 2007 WL 2904117 (N.D.Ga., Sept. 28, 2007).....	7
<u>Miller v. Berkebile,</u> 2008 WL 635552 (N.D.Tex., March 10, 2008).....	7

## STATEMENT OF THE ISSUES

1. THE CIRCUIT COURT ABUSED ITS DISCRETION AND ERRED IN SEVERAL RESPECTS IN DENYING MR. SANDERS PETITION FOR JUDICIAL REVIEW OF THE CLAIMS BOARDS DECISIONS.
2. WHETHER THE REMEDY UNDER WIS. STATS. § 775.05 CONFORM TO THE DUE PROCESS REQUIREMENTS OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN THE WIS. CLAIMS BOARD, IGNORE A CLAIMANT REQUEST FOR ADDITIONAL COMPENSATION, WITHOUT A RATIONAL BASIS OR EXPLANATION, THEREBY CONSTRUCTIVELY IMPOSING THE LOSS OF THE RIGHT TO FILE SUIT AGAINST THE STATE, UNDER WIS. STATS. § 775.01 AND § 775.05?
3. WHETHER THE CLAIMS BOARD DECISION TO IGNORE MR. SANDERS CLAIM FOR ADDITIONAL COMPENSATION, DEPRIVED MR. SANDERS OF HIS FIRST AMENDMENT CONSTITUTIONAL RIGHT OF ACCESS TO THE COURT, UNDER WIS. STATS. § 775.01 AND § 775.05?
4. WHAT IS THE PROPER STANDARD TO BE UTILIZED IN REVIEWING AN AGENCY DECISION WHICH DEVIATES FROM THE AGENCY PRIOR PRACTICE? AND, IN UTILIZING THE PROPER STANDARD, DID THE CLAIMS BOARD DEVIATE FROM THAT PRIOR PRACTICE, WHEN IT FAILED TO ADDRESS THE CLAIM AND/OR EXPLAIN ITS REASONING IN NOT FORWARDING THE CLAIM TO THE LEGISLATURE?
5. WHETHER MR. SANDERS WAS PREJUDICE BY THE CLAIMS BOARD, BY NOT BEING INFORMED OF THE EX PARTE COMMUNICATION WITH A PARTY LITIGANT ON A ISSUE BEFORE THE BOARD CONCERNING THE ADDITIONAL COMPENSATION CLAIM?

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Derrick Sanders believes that only publication is appropriate in this case, as this case involves important issues of Constitutional Magnitude and Statutory Interpretation, that are first impression in Wisconsin, regarding Wis. Stats § 775.05 Innocent Convict Compensation, Claimant rights to commence an action against the State, and the rules and procedures to be followed by the Wis. Claims Board.

Publication is appropriate because it would address and help clarify these important areas of law, and statutory procedures to be followed by the agency when presented with a claimant's claim for additional compensation under Wis. Stats. § 775.05.

## STATEMENT OF THE CASE

### A. Nature of the Case

Derrick A. Sanders (hereafter, Mr. Sanders), appeals from the Circuit Court Decision and Order denying his Petition for Judicial Review of the Wis. Claims Board decisions (**R.23:1-7**); appeals from part of the Wis. Claims Board decision wherein the Claims Board failed to address and/or forward his claim for additional compensation to the Wisconsin Legislature (**R.6:102;App.116**); and appeals from the whole of the Wis. Claims Board decision denying his petition for rehearing wherein Mr. Sanders first learned of ex parte communications without notice, on issues being decided before the claims board regarding his additional claim. (**R.8:1-6**).

### B. Procedural Status of the Case

Mr. Sanders was incarcerated for over 25 years for allegedly being a party to a crime to First Degree Intentional Homicide (**Milw. Case No. 93-CF-932217**).

On Sept. 13, 2018, Mr. Sanders was eventually exonerated of the crime and his conviction was vacated by order of the court.

On Jan. 22, 2019, Mr. Sanders submitted a claim for compensation to the Wis. Claims Board, pursuant to **Wis. Stats. §775.05 (R.5:1-112;App.120)**.

On Jan. 24, 2019, the Wis. Claims Board sent Mr. Sanders a letter informing him that he had submitted the wrong form and enclosed the correct form for him to complete. (**R.5:1-112**)

On Feb. 11, 2019, Mr. Sanders re-submitted his claim using the correct form, which included a claim for the statutory maximum of \$25,000, as well as a claim for additional compensation in the amount of \$5,729,965.00, for a total of \$5,754,965.00. (**R 5:1-112**)

The Wis. Claims Board reviewed Mr. Sanders' claim and asked the Milw. County District Attorney office to respond to the claim pursuant to **Wis.Stats.§775.05(2)**. (**R 5:1-112**)

On April 1, 2019, District Attorney (John Chisolm) responded by letter, a copy of which was sent to Mr. Sanders, stating that *'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. 6:1-102** ).

On Sept. 12, 2019, Sanders received an email from Claims Board Program & Policy Analyst (Patricia Reardon) informing him that *"[T]he board feels that it needs additional information before deciding your claim and wants to have a hearing so that both parties can be there to answer questions."*

On Nov. 06, 2019, Patricia Reardon started communication with the Milwaukee District Attorney Office informing them of the rescheduled hearing date and asking to be informed of whom from their office will appear at the hearing to represent them. Reardon gave a Nov. 22, 2019 deadline for a response.

On Nov. 25, 2019, three days after Reardon's supposed deadline, DDA Kent Lovern of the Milw. County District Attorney's responded to Reardon and informed her that *"The Milwaukee County District Attorney's Office will not send anyone to this upcoming hearing,...and we have nothing further to add."* Approximately 20 minutes later, Reardon responded by asking: *"DA Chisolm's April 1, 2019, response to the Claims Board stated 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? At 12:27pm, approximately one and a half hours later, DDA Lovern, and not DA Chisolm, responded by stating that the D.A's office now supports only part of Sanders' petition. (R 7:1-71).*

It must be noted that DDA Lovern's response was not only a change in position from DA Chisolm's original position as stated in the April 1, 2019 letter, which Chisolm stated was arrived at after reviewing all the facts of the petition, but more importantly, it has never been clarified if such position was that of DDA Lovern or DA Chisolm. Because Sanders was never provided with a notice of this correspondence, he was unable to receive clarification of who authorized such position change.

On Dec. 19, 2019 the Claims Board held a hearing on Mr. Sanders' claim. **(R.6;1-102)**

On Feb. 12, 2020, the Claims Board issued a decision in which it concluded that the evidence was clear and convincing that Mr. Sanders was innocent of the crime for which he had been convicted and awarded him the statutory maximum of \$25,000. In its decision, the Board failed to address Mr. Sanders' additional damages claim. **(id).**

On March 3, 2020, Mr. Sanders filed a Petition for Rehearing with the Claims Board in which he claimed the Board made material errors of law and facts regarding DA Chisolm's April 1, 2019 letter and Claims Board procedures. **(R.7:1-71).**



On March 31, 2020, The Claims Board denied Mr. Sanders' Petition for a Rehearing, via a letter, attaching an email of communications between the Claims Board and the DA's office. **(R. 6:1-102 )**. The attached emails between the two was the first time Mr. Sanders heard of this Nov. 25, 2019 contact or the change in the DA's position, making such communication ex parte communication.

On April 27, 2020, Mr. Sanders filed a Petition for Judicial Review of the Claims Board actions. **(R.1:1-18)**.

On January 20, 2021, Circuit Court Judge Stephen E. Ehlke, issued a Decision and Order denying Mr. Sanders' Petition for Judicial Review. **(R.23:1-7)** A timely Notice of Appeal was filed to commence this appeal.

### **C. Disposition Below**

Mr. Sanders appeals from the Circuit Court, the Honorable Stephen E. Ehlke, Decisions and Order denying petition for judicial review, where the court held: **1)** The board was not required to take action on Mr. Sanders' claim for additional compensation; **2)** That the two previous Innocent Convict Compensation awards cited by Mr. Sanders does not establish prior agency practice that the Board must follow in Mr. Sanders' case; **3)** That the Board did not engage in any ex parte communication; and **4)** That the Board's failure to address and/or recommend additional damages to the legislature did not deny Mr. Sanders access to the Courts under the 1st Amendment, as the Board is not required to recommend additional damages to the legislature, under **§775.05(4)**.

### STATEMENT OF THE FACTS

Derrick Sanders was incarcerated over 25 years for being party to a crime of first degree intentional homicide. (**Milw. Co. Case No. 93-CF-932217**). Mr. Sanders was cleared of the crime and his conviction was vacated by order of the Court on Sept. 13, 2018.

On Jan. 22, 2019, Mr. Sanders submitted a claim for compensation to the Wisconsin Claims Board (WCB), pursuant to Wis. Stats §775.05. (**R.5:1-112**).

On Jan. 24, 2019, the (WCB) sent Mr. Sanders a letter informing him that he submitted the wrong form and enclosed the correct form for him to complete. (**R.id**).

On Feb. 11, 2019, Mr. Sanders re-submitted his claim using the correct form which included a claim for the statutory maximum of \$25,000, plus a claim for additional compensation in the amount of \$5,729,965 for a total of \$5,754,965. (**R.5:1-112**).

The (WCB) reviewed Mr. Sanders' claim and asked the Milwaukee County District Attorney's office to respond to the claim.

On April 1, 2019, District Attorney John Chisolm responded by letter stating that after reviewing the facts of Sanders' Claim, he did not oppose such claim.

On Nov. 25, 2019, unbeknown to Mr. Sanders, (WCB) staff member Patricia Reardon emailed the DA 's office asking if *DA Chisolm's letter meant that he did not oppose Mr. Sanders' entire claim for \$5,754,965?* (**R. 27:3**).

After several undisclosed emails/conversations between Reardon and the DA's office, and after the District Attorney's office stated it had nothing further to add, DDA Lovern changes DA Chisolm's earlier position expressed in his April 1, 2019 letter of not opposing Sanders' claim, and unexplainably states: "*...it only supported Mr. Sanders' request for the \$25,000 maximum and had no position regarding his additional damages request*".

On Dec. 19, 2019, after failing to reach a decision at Sanders' original hearing and postponing such decision in order to obtain more information, the (WCB) held a hearing on Mr. Sanders' claim. The DA's office did not appear. Sanders appeared for the hearing in which he was asked only 2 questions: "*Where did you come up with the 5 million dollar amount?*", and "*Have you tried to sue your attorney for malpractice?*". (**R.7:1-71**).

On Feb. 12, 2020, the (WCB) issued a decision in which it concluded the evidence was clear and convincing that Mr. Sanders was innocent of the crime for which he had been convicted. The (WCB) awarded Mr. Sanders the statutory maximum amount of \$25,000 but failed to address his claim for additional compensation. In its decision, the (WCB) made references to statements that were not stated in DA John Chisolm's April 1, 2019 letter.

On Mar. 3, 2020, Mr. Sanders filed a Petition for Rehearing with the (WCB) due to errors of facts in the statements made by DA Chisolm's April 1, 2019 letter to the (WCB) and for failing to address Mr. Sanders' claim for additional compensation. **(R.7:1-71)**.

On Mar. 31, 2020, the (WCB) denied Mr. Sanders' petition for a hearing via a letter. Attached to such letter was a Nov. 25, 2019 email showing ex-parte communication between the (WCB) and the DA's office. **(id)**. Mr. Sanders had no knowledge of any communication between the DA's office and the (WCB) beyond the April 1, 2019 letter and only became aware of this ex-parte communication in the (WCB's) Mar. 31, 2020 decision denying his petition for rehearing.

On Apr. 27, 2020, Mr. Sanders filed a Petition for Judicial Review of the (WCB) decisions. **(R. 1:1-18)**

On Jan. 20, 2021, The Circuit Court issued a Decision and Order denying Mr. Sanders' petition for judicial review of the (WCB) decisions. **(R.23:1-7 )**.

A timely Notice of Appeal was filed which is the subject of this appeal.

## ARGUMENT

### **I. THE CIRCUIT COURT ABUSED ITS DISCRETION AND ERRED IN SEVERAL RESPECTS IN DENYING MR. SANDERS' PETITION FOR REVIEW OF THE WISCONSIN CLAIMS BOARD (WCB) DECISIONS.**

The Petitioner, Derrick Sanders (hereafter, Mr. Sanders), asserts that in this case, there exists several issues of constitutional magnitude and statutory interpretation that are of first impression in this State and that must be addressed by this Court in order to determine whether the Respondent (Wis. Claims Board), and the trial court, abused their discretion. Mr. Sanders asks this Court to reverse the Circuit Court and Wis. Claims Board with respect to their findings.

#### ***A. Whether the Remedy under Wis.Stats. §775.05 conforms to the Due Process Requirements of the 14th Amendment of the United States Constitution, when the Wis. Claims Board ignores a Claimant's request for additional compensation without a rational basis or satisfactory explanation; thereby constructively imposing the loss of the right to file suit against the State under Wis. Stats. §775.01 & 775.05?***

Mr. Sanders was incarcerated for over 25 years for being party to a crime of first degree intentional homicide (**Milw. County Case No. 93-CF-932217**). On Aug. 2, 2018, Mr. Sanders was allowed to withdraw his plea to the charge based on the Circuit Court concluding that the State failed to demonstrate that a factual basis existed for Mr. Sanders' plea, and that Sanders entered such a plea knowingly, voluntarily and intelligently.

On Sept. 13, 2018, a hearing was held and the Milwaukee County District Attorney's office entered a motion to dismiss all charges against Mr. Sanders, which the Court granted, therefore vacating Mr. Sanders' conviction and releasing him forthwith.

Under **Wis. Stats. § 775.01 & 775.05**, as a procedure to commence an action against the State, Mr. Sanders was required to present his claim for compensation for innocent convicts to the Wis. Claims Board for the 25 plus years he was wrongfully convicted and confined in the Wisconsin Prison system.

On Jan. 22, 2019, Mr. Sanders submitted a claim for compensation to the Claims Board pursuant to **Wis. Stats. §775.05**. Mr. Sanders' claim sought the statutory maximum amount of \$25,000 plus additional compensation in the amount of \$5,754,965. **(R.5:1-112) Wis. Stat. §775.05** allows the Claims Board to award more than the statutory maximum amount by recommending such a request, or one it deems appropriate, to the Legislature. If the Legislature refuses to allow such additional compensation claim, the claimant may then commence an action against the State. See e.g., **Weis v. Bd. of Regents of Univ. of Wis. System**, 837 F. Supp. 2d 971 (E.D.Wis. 2011).

In the instant case, the Respondent conceded in its Response Brief that: *"Wis. Stats. §775.05(1) only authorizes a suit against the State when the Legislature has refused to allow a claim against the State. If the Claims Board does not forward a recommendation for a claim for additional damages to the Legislature, there is no claim for the Legislature to refuse, and in such circumstances, a person cannot, therefore, sue the State, since there is no claim that has been refused by the Legislature. (R.15:1-10)*

As a matter of due process, if **Wis. statutes §775.01 & 775.05(1)** authorizes a suit against the State when the Legislature has refused to allow a claim, but in order to file a suit, the claim must first be presented to the Wis. Claims Board who is required to make a decision and 'forward a recommendation' on a claim for additional compensation to the Legislature once the criteria is met for the \$25,000 statutory limit, then such additional compensation claim **must** be addressed.

If the Claims Board refuses to address a Claimant's claim for additional compensation, and makes no recommendation to the Legislature, nor gives any reason or explanation why it failed to do so, the Claimant (Mr. Sanders) has been constructively denied, sub silentio, the remedy of the right to file suit against the State for additional compensation for the wrongful conviction.

While a State is not required to grant such a right to be sued, however, when it does so by enacting **Wis. Stat. §775.05**, a remedy for innocent convicted persons, and sets forth a procedure to allow a suit against the State, the State cannot grant the right to file suit with one hand and with the other take it away in an arbitrary fashion. See e.g., **Evitts v. Lucey**, 469 U.S. 387. 400-01 (1985).

Once the State of Wisconsin has assured an innocent convicted person of a remedy for suing the State, (**Wis. Stats. § 775.05**), and such remedy requires such innocent convicted person to present a claim to the Claims Board, due process bars the Claims Board or State from imposing a loss (i.e., the right to file suit), when the innocent convicted person acts on the remedial statute, meets the criteria and relies on the assurance that the Claims Board will follow the statute in its entirety. See e.g., Cox v. Louisiana, 379 U.S. 559, 568-73 (1965) (conviction for picketing near courthouse violated due process where police did not object to location and, in essence told defendants they could meet there); Raley v. Ohio, 360 U.S. 423, 437-40 (conviction for refusing to answer certain questions violated due process where defendants were told that their refusals were privileged); United States v. Cacera, 440 U.S. 741, 752-53 (1979) (*Due process is violated when 'an individual had relied on agency regulation promulgated for his benefit, and has suffered substantially because of their violation by the agency'*),

On review in the Circuit Court, the court held that the Claims Board was not required to make a recommendation to the Legislature, as it was conditional, and that the Board only needs to submit a recommendation (if) it finds the statutory maximum is not adequate. (**R.23:1-7**) (**Ct. Order, 1/20/21**).

Mr. Sanders believes that the Court erred in its Jan. 20, 2021 decision because this interpretation of the statute leads to ambiguity in the statute **§775.05** meaning in regards to the role of the Claims Board and the Legislature and the procedures to be followed when a claim for additional compensation is submitted by a claimant.

Here in this case, once Mr. Sanders met the criteria set forth in **Wis. §775.05(2-4)** and was awarded the statutory maximum of \$25,000, any additional compensation claim made by Mr. Sanders should have been addressed and thus forwarded to the Legislature under **§775.05 (4)** for the following two (2) things to take place:

- 1.) So the Legislature could either grant or deny the claim; and
- 2.) To preserve Mr. Sanders' right to commence an action against the State under **§775.01 & 775.05** for compensation should it be denied by the Legislature.

This is so, because it is the Legislature's decision to grant or deny a claim for additional compensation, NOT THE CLAIMS BOARD. See **Weis, 837 F.Supp 2d 971**.

The Court should also take Judicial Notice of the fact that this is also stated on the Claims form provided to Mr. Sanders, which states in pertinent part: **COMPENSATION REQUESTED:** *Additional Compensation requested (attach justification for additional compensation/explanation of amount claimed. Additional Compensation may only be awarded by approval of the State Legislature).* (R.5:1-112)(Claim Form)

Mr. Sanders submitted a claims form request for additional compensation and a facts sheet as explanation/justification of the claim for additional compensation, with all documentation attached for the wrongful conviction, loss of liberty, loss of wages, future earnings, mental and emotional pain, and distress suffered for the 25-plus years confinement in Wisconsin prisons, all which was ignored by the Claims Board (R.5:1-112 ) (Claim Fact Sheet).

If the Claims Board is the "Gatekeeper" to an innocent convict commencing an action against the State under §775.01 and 775.05, it is imperative that the Claims Board decision reflect a rational basis/explanation for **NOT** addressing and/or forwarding the additional compensation claim to the Legislature, thereby imposing a loss on Mr. Sanders of the right to commence an action against the State for the additional compensation. The fourteenth Amendment entitles an individual to a fair opportunity to present a claim where that claim has a reasonable basis in fact or law. See **Bill Johnson Restaurant, Inc. v. N.L.R.B.**, 461 U.S. 731, 741, 103 S.Ct. 2161 (1983); **Bell v. City of Milw.**, 746 F.2d 1205, 1261 (7th Cir. 1984).

As such, due process was violated when Mr. Sanders, relying on a statute created for his benefit to compensate those wrongfully convicted (**Wis. Stats. §775.05**) , suffered a substantial loss of not only review of his additional compensation claim, but also of his right to commence an action against the State for additional compensation due to the Claims Board violation of such statute. See e.g., **U.S. v. Cacera**, 440 U.S. at 752-53 (1979).

This Court should reverse the Circuit Court and the Claims Board decisions in the interest of justice.

**B. Whether The Claims Board Decision to Ignore Mr. Sanders' Claims for Additional Compensation Deprived Mr. Sanders' of His First Amendment Constitutional Right of Access to the Court, Under Wis. Stats. §775.01 and 775.05?**

Mr. Sanders contends that the Wisconsin Claims Board abused its discretion when it refused to address his additional compensation claim and/or forward the claim to the Legislature, which deprived him of his First Amendment Right under the U.S. Constitution to access the court in redress of a grievance.

On review in the Circuit Court, the Court held that the Claims Board is not required to recommend additional damages to the Legislature under **775.04(4)**, and that the Board acted within the confines of the law and did not abuse its discretion. **(R.23:1-7)(Cir. Ct.Order)**.

The question that must be decided by this Honorable Court is: *When an Innocent Convict meets the criteria set forth in Wis. Stats. §775.05 and submits a claim for additional compensation, how does the Claimant preserve his or her rights of Access to the Court under §775.01 and 775.05 to commence an action against the State if the Claims Board hinders the statutory exhaustion process by ignoring the additional compensation claim or forwarding the claim to the Legislature for decision? The statute is silent on this issue and Mr. Sanders' pro-se research has found no authority for this kind of situation he now finds himself in.*

Under **Wis. Stats, §775.01 and 775.05**, before an action can be commenced against the State, the Claimant (as means of exhaustion), must present his claim to the Wis. Claims Board, which investigates the claim and makes a decision and recommendation to the Legislature to grant or deny the claim. If the Legislature refuses to allow the claim, the Claimant may then commence an action against the State. See e.g., **Weis v. Bd. of Regents of Univ. of Wis. Systems, 837 F.Supp.2d 971, 977 (E.D. Wis. 2011)**.

The Claims Board conceded that **Wis. Stats. §775.05(1)** only authorizes a suit against the State when the Legislature has refused to allow a claim against the State. If the Board does not forward a recommendation for additional damages to the Legislature, there is no claim for the Legislature to refuse, and in such circumstances a person cannot sue the State. **(R.15:1-10 )**. The right of individuals to pursue legal redress for claims which have a reasonable basis in law and fact is protected by the 1st and 14th Amendments. **Bill Johnson Restaurants, Inc., 461 U.S. at 741 (1983)**.



By the Claims Board ignoring the additional compensation claim and/or failing to forward the claim to the Legislature for decision, it rendered the statutory process incomplete and constructively hindered Mr. Sanders' exhaustion process, thereby depriving Mr. Sanders of his First Amendment right of Access to the Court to commence an action against the State for the additional compensation, under Wis. Stats. §775.01 and 775.05. See e.g., Davis v. Milw. County, 225 F.Supp. 2d 967, 975-76 (E.D. Wis. 2002) (*Plaintiff denied access to the courts by defendants hindering his ability to exhaust...*); Miller v. Berkebile, 2008 WL 63552, 7-9 (N.D. Tex., Mar. 10, 2008) (Unjustified refusal to process initial grievance made remedy unavailable); Chatham v. Adcock, 2007 WL 2904117, (N.D. Ga., Sept. 28, 2007) (*"It would be an anomalous result indeed if officials could foreclose inmates from filing civil rights lawsuits in federal court simply by depriving them of the means to fulfill a mandatory prerequisite to doing so."*).

Here in the instant case, the Claims Board deprived Mr. Sanders of the means to fulfill a mandatory prerequisite to commencing an action against the State, by ignoring the claim, and thus, abusing its discretion and depriving Mr. Sanders of his First Amendment right to access the courts in redress of his claims for additional compensation for his wrongful conviction. See, Lewis v. Casey, 518 U.S. at 353 n. 3, 116 S.Ct. 2174 (depriving someone of an arguable ((though not yet established)) claim inflicts actual injury because it deprives him of something of value-arguable claims are settled, bought and sold).

The Court should reverse the Circuit Court and the Claims Board decision in the interest of justice.

**C. What Is the Proper Standard to Be Utilized In Reviewing An Agency's Decision Which Deviates From The Agency's Prior Practice? And, In Utilizing The Proper Standard, Did The Claims Board Deviate From That Prior Practice When It Failed To Address the Claim and/or Explain Its Reasoning In Not Forwarding the Claim to The Legislature?**

**1. WHAT IS THE PROPER STANDARD OF REVIEW OF AN AGENCY DECISION WHICH DEVIATES FROM THE AGENCY'S PRIOR PRACTICE?**

Mr. Sanders contends that the Claims Board ignored and/or failed to make a recommendation or forward the claim for additional compensation to the Legislature, without an explanation, as it has done in prior case practices.

The proper standard of review of this issue is under the rational basis analysis. The plain language of **Wis.Stats. §227.57(8)**, states: "*Exercise of discretion which are inconsistent with the agency's prior practice are not fatal if, "deviation therefrom," is satisfactorily explained to the court.*" See **Stoughton Trailors, Inc. v. LIRC 2006 WI APP 157 ¶ 27, 295 Wis. 2d 750, 721 N.W. 2d 102**. Therefore, in order to determine what amounts to a satisfactory explanation, the court must direct its attention to prior case law.

In **Public Serv. Corp. v. Public Serv. Comm., 109 Wis.2d 256, 325 N.W.2d 867 (1982)**, the court stated: "*While this court has recognized that inconsistencies in determinations arising by comparisons are not proof of arbitrariness or capriciousness, if the deviation is so unreasonable as to be without a rational basis or result of unconsidered, willful and irrational choice of conduct, the decision is an arbitrary and capricious one.* **Robertson Transp. Co., v. Public Serv. Comm., 39 Wis. 2d 653, 159 N.W. 2d 636 (1968); Olsen v. Rothwell, 28 Wis. 2d 233, 137 N.W. 2d 86 (1965).** *Agencies are not free to shift between decisions without a rational basis.*" **Public Serv. Corp., v. Public Serv. Comm., 109 Wis. 2d at 263, 325 N.W. 2d 867 (Emphasis added).**

Thus, Mr. Sanders believes that a satisfactory explanation of a deviation from prior agency practice under section **§227.57(8)** must be grounded upon a rational basis, and therefore, the proper review under section **§227.57(8)** is that any deviation from past agency practice will be sustained only if grounded upon a rational basis. **Id.**

## **2. DID THE CLAIMS BOARD DEVIATE FROM PRIOR PRACTICE WHEN IT FAILED TO ADDRESS AND/OR FORWARD CLAIMANT'S ADDITIONAL COMPENSATION CLAIM TO LEGISLATURE?**

In this case, the Claims Board failed to address Mr. Sanders' claim for additional compensation or forward his claim to the Legislature without a rational basis or explanation, as it has done in prior Innocent Convict compensation case practices. See (**Claims Bd.Precedent Log, case Francis, Robert Lee Stinson, and Steven Avery (R.6:1-102 )**).

Upon review in the Circuit Court, the Court held that: "*The two previous innocent convict compensation awards, cited by Mr. Sanders, do not establish "prior agency practice" that the Claims Board must follow in Mr. Sanders' case, citing **Barron Elec. Co-Op v. Public Serv. Comm'n of Wis., 212 Wis. 2d 752, 771, 569 N.W. 2d 726 (Ct. App. 1997) ( A single decision that is factually distinguishable does not violate the prior agency practice rule).** (R.23:1-7) (Ct. Order)*

The Courts have recognized that the exercise of discretion by an agency involves more than simply making a choice between alternatives without stating the reasons behind the choice. **Reidinger v. Optometry Exam. Bd.**, 81 Wis. 2d 297-98, 260 N.W. 2d 270 (1977). The Court further stated: *"This process must depend on facts that are of record or that are reasonably derived by inferences from the record and a conclusion based on logical rationale founded upon proper legal standards. As we pointed out in State v. Hutnik (1968), 39 Wis. 2d 754,764, 159 N.W. 2d 733....., There should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth. Id. citing McCleary v.State, 49 Wis. 2d 263, 277, 182, N.W.2d 512 (1971)."*

Here, there is no evidence in the record that discretion was exercised on the additional compensation claim. First, in its response, the Claims Board claims Sanders' additional compensation claim was never an issue and did not need to be addressed, if such is true, the Board should be asked to explain 1.) Why did it request the DA to appear at Sanders' rehearing? 2.) Why did Reardon need clarification concerning Sanders' additional compensation claim? and 3.) Why was Sanders asked **only** two questions at his rehearing, both dealing with additional compensation? Each question proves contrary to what the WCB is claiming, additional compensation was in fact an issue. Furthermore, at the very least, the Board should be forced to explain how claims brought before them could be ignored?

The Claims Board has failed to explain why it did not address Sanders' additional compensation claim as it did similar claims. Even if the Claims Board felt Sanders did not merit such additional compensation, it had a duty to address and vote on such a claim. According to the Claims Board policy and procedure, an unanimous vote is needed to award the \$25,000 statutory maximum amount but not to award additional compensation. Nothing in the record suggests a vote was ever taken.

Thus, because Mr. Sanders is similarly situated to prior claimants whose additional compensation claims were heard, he was entitled to have his claim heard and decided.(Similarly situated in that the only criteria needed to receive compensation from the Claims Board is to be deemed innocent of the crime and not causing the wrongful conviction; no other unique circumstances are needed.) The Claims Board has failed to explain its rationale in its disparate treatment of Mr. Sanders' case claim, from the Hemauer, Stinson, and Avery cases, or all other cases where additional compensation claims were addressed/heard; stating only that those cases were: *"Unique Individual Circumstances"*. (R.15:1-10)(Resp. Br. at 6).

If the Claims Board determined that Mr. Sanders' case did not present the alleged '*unique circumstances*' as the (Hemauer, Stinson, and Avery) cases in which additional compensation was awarded, it should have not only cited such circumstances, which must be found in the record, but the Claims Board was also obligated to explain its rationale in its two decisions and brief on how/why it reached such conclusion ('If a rational basis exist for deviation from prior agency practice it must be articulated') see e.g. **Kammes v. Mining Inv. & Local Impact Fund Bd.**, 1115 Wis. 2d 144, 157, 340 N.W.2d 206, 213 (Ct. App. 1983) Agencies are not free to shift between decisions without a rational basis. See **Wis. Public Serv. Corp.**, 109 Wis. 209 at 263, 325, N.W. 2d at 870 (1982). It must be noted that **Wis. Stats. §775.05** makes no mention that '*unique circumstances*' must exist before an additional compensation claim can be awarded.

The Claims Board's two decisions are void of any explanation of '*unique circumstances*' which would eliminate Mr. Sanders from having his additional compensation claim heard by the Claims Board and/or forwarded to the Legislature, as it did in the Hemauer, Stinson, and Avery cases. Since the Legislature is the only body that can approve or deny an award for additional compensation, Sanders had a right to have his additional compensation presented and addressed by the Legislature, just as other similarly situated claimants had.

The intent of the Legislature in creating **Wis. Stats. §775.05**, was to confer upon the Claims Board the discretion to determine an amount that would fairly compensate those wrongly convicted of a crime and section **§775.05(4)** provides a mechanism to ensure adequate compensation to those whose request for '*additional compensation*' is beyond the Claims Board \$25,000 statutory limit. Section **§775.05(4)**, was to ensure that the Legislature would have the control and final say on a claimant's request for additional compensation beyond the Claims Board statutory limit by requiring the Board to forward the additional compensation claim with a recommendation on the claimant's request by specifying an amount that it considers to be adequate from the claimant's additional compensation request.

As such, **Wis. Stats. §227.57(8)** governs this issue, and the Claims Board abused its discretion when it deviated in Mr. Sanders' case from its prior practice it had done in the previous case of: Hemauer, Stinson, and Avery. Therefore, the trial court also abused its discretion in its decision, affirming the Board's decision.

**D. Whether Mr. Sanders Was Prejudiced By The Claims Board Not Being Informed Of The Ex Parte Communication With A Party Litigant On An Issue Before The Board Concerning The Additional Compensation Claim?**

Mr. Sanders contends that the Claims Board engaged in Ex parte communication with the District Attorney's office on an issue before the Board without notification to Mr. Sanders for response. Upon review in the Circuit Court, the Court erroneously held that Petitioner's argument was undeveloped and failed to show that the Board materially relied on any ex parte communication in reaching its decision. (R.23:1-7).

According to Black's Law Dictionary, Ex parte communication is defined as: "*Any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between: (1) an interested person outside the Board (including such parties counsel); and (2) The administrative law judge handling that proceeding, a member of the Board, or a decisional employee.*"

Here, Mr. Sanders claims the communication between Patricia Reardon (Wis. Claims Bd. Program & Policy Analyst), and Deputy Dist. Atty. (DDA) Kent Lovern, was ex parte communication without his knowledge. Sanders contends that in the instant case, at least three communications between Reardon and the DA's office took place without his knowledge, one, which is of concern to this appeal, took place between Reardon and DDA Lovern, and such ex parte communication affected the hearing process and prejudiced Mr. Sanders' additional compensation claim.

A review of the record will show that on Feb. 15, 2019, the Claims Board sent Milw. Dist. Atty. (John Chisolm) a copy of Mr. Sanders' claims form requesting a response, this was the first communication between the Claims Board and the D.A's office. On April 1, 2019, DA Chisolm responded stating: "*....Based upon review of the facts surrounding the crime and Mr. Sanders' petition for compensation, the Milwaukee District. Atty's office does not oppose his petition.*" A copy of this letter was sent to Mr. Sanders.

The second communication between the Board and the DA.'s office occurred after the Claims Board deferred Mr. Sanders' hearing for a later date and requested Sanders and the District Atty. to appear at the hearing. The District Atty. Office declined to appear stating: "*it had nothing further to add other than what was stated on the record in open court by Asst. Dist. Atty. Paul Tiffin...*". (R.7:1-71).

The third communication between the Board and the DA's office occurred when the Board, via Patricia Reardon, contacted the DA's office under the guise of 'seeking clarification' before Sanders' hearing. It is this communication that is the subject of this appeal. It must be noted that according to the Claims Board's rules and/or procedures, once the DA's office declined to appear at the hearing and stated it had nothing further to add, the Claims Board should have decided the merits of the case based on the written materials submitted. The Claims Board rules state: *"If neither the claimant nor agency wishes to attend a hearing, the claims board can decide the claim based on the written materials submitted by the claimant and agency, without any appearances by the claimant or agency."* **See website:([claimsboard.wi.gov/ section asp?linkid=107](https://claimsboard.wi.gov/section.asp?linkid=107)).**

The 'supposedly' clarification the Board was seeking involved additional compensation. Patricia Reardon, acting on behalf of the Claims Board, contacted DDA Kent Lovern via email and asked: *"..are you saying the D.A. office does not oppose payment of \$5,754,965 to Mr. Sanders?"* D.D.A Lovern responded: *"John's letter of April 1, 2019, intends to express our general support for Mr. Sanders' petition for compensation. We originally saw his form that requested the statutory maximum amount of \$25,000, which we support. 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.6:1-102).*

The impropriety of this third ex parte communication on the issue of additional compensation being decided by the Board is evident. First, in its response brief, the Claims Board stated it did not even consider Sanders' additional damages claim, thus, if Sanders' additional damage claim was never being considered by the Board, why did Reardon need to contact the District Attorney's office and inquire about their position on Sanders' additional damages claim? Furthermore, in seeking clarification of the District Attorney's office position concerning additional compensation, Reardon nor the Claims Board ever contacted DA Chisolm, the author of the April 1, 2019 letter which was in question.

The importance of contacting DA Chisolm to clarify his position was imperative in that it was initially Chisolm who stated on record that the Milw. County District Attorney's office did not oppose Sanders' claim; thus, if the DA's office position had changed, which clearly it did as DDA Lovern's position was different than Chisolm's April 1, 2019 position, then it should have either been DA Chisolm to communicate such change, or at the very least, indication that Chisolm was in fact contacted regarding such change.

11

In failing to notify Sanders before or during his hearing about its communication with DDA Lovern, Reardon and/or the Claims Board failed to adhere to **Wis. Stat. §16.007(2)**, which states in pertinent part: *".....The board may take official notice of any generally recognized fact...., but parties shall be notified either before or during the hearing..., or otherwise of facts so notice, and the parties shall be afforded an opportunity to contest the validity of the notice.*

Thus Sanders' argument, which he has advanced throughout his brief and which is clear and fully developed, is that because he was not made aware of such communication until **after** the hearing---when the Claims Board responded to Sanders' request for a rehearing, and because such communication was in fact relevant to the hearing process and The Claims Board relied at least partially on this communication to deny him additional compensation, by definition such communication was ex parte. Furthermore, Sanders argues that failing to notify him of such communication prevented him from contesting statements made by DDA Lovern in such communication between him and Reardon.

In his response to Reardon, DDA Lovern made statements that need to be clarified and explained. Lovern stated: *"John's letter of April 1, 2019, intends to express our general support for Mr. Sanders' petition for compensation. We originally saw his form that requested the statutory maximum amount of \$25,000, which we support. Regarding his other claims for damages, which appear to have varied over the course of this process, we are not taking any position on those claims..".* Sanders argues this statement is factually false and needs clarification.

The record is clear that Sanders submitted only **one** (1) form which not only requested the statutory maximum amount of \$25,000, but such form also requested an additional amount of \$5,754,965. (**See Appendix 120** ). Thus, Lovern must not only explain why after viewing such form did DA Chisolm not make the same statement that Lovern is making, instead stating that he did not oppose such claim [in its entirety], but also Lovern needs to explain why after viewing only one claims form/request, did he make the false statement of *'...appears to have varied over the course of this process.'* These questions needed to be answered before or during Sanders' hearing.



As argued in his brief, Sanders opines that had he been made aware of such statements before or during his hearing, as required by **Wis. Stat. §16.007(2)**, he would have not only contested Lovern's statement of *his claim varying over the course of this process*, but also, because the District Attorney's Office made it clear on two separate occasions that it had nothing further to add other than Chisolm's April 1, 2019 letter and what was stated in open court, and because Sanders had a right to inquire whom DDA Lovern was speaking for, Sanders would have definitely questioned DDA Lovern regarding the 'we' he was speaking about in his communication.

The Courts have held that ex parte communications would constitute material error only if a party was prejudiced by an inability to rebut facts communicated and if improper influence on the decision maker appears to have resulted. **State ex. Rel. Irby v. Israel, 100 Wis. 2d 411, 425, 302 N.W. 2d 517, 525 (Ct. App. 1981) (emphasis added)**. Here, in the instant case, Sanders has not only clearly shown that he was unable to rebut the facts communicated in DDA Lovern's email, but even more prejudice than such, is that Patricia Reardon, the Claims Board Program & Policy Analyst, held improper influence on the Claims Board's decision making.

Patricia Reardon, who processes claims forms, is not one of the Claims Boards Five committee members who decides a claimant's claim. See **(R. 1-10) (Claim Bd; Decision, p.4) (Listing names)**. Yet, Ms. Reardon's continued contact with DDA Lovern by email, without notice to Mr. Sanders, shows that she occupied a position adverse to Mr. Sanders' interest. The record is silent on if any member of the Board directed Reardon to initiate such communication, and if so, Reardon still should be asked to explain why after possessing the April 1, 2019 letter from DA Chisolm in which he stated his position was reached after reviewing all the facts, and after being informed by the Milw. County District Attorney Office that they had nothing further to add, did she need clarification on the District Attorney Office's position.

**Wis. Stats. §16.007 & 775.05** defines the Claims Board rules and procedures and The Claims Board is bound by their own rules. **State ex rel. Meeks v. Gagnon, 95 Wis. 2d 115, 119, 289 N.W. 2d 357, 361 (Ct. App. 1981)**. These rules define the boundaries of an agency's authority, and when it abandons or exceeds them it acts beyond its authority. **State ex rel. Jones v. Franklin, 444 N.W. 2d at 740 (1989)**; and the proceedings are rendered invalid. See **State ex rel. Anderson-El v. Cooke, 234 Wis. 2d 626, 610 N.W.2d 821; WI at § 7**.

The Court should reverse the Circuit Court and the Claims Board decisions in the interest of justice.



### CONCLUSION

WHEREFORE, the reasons set forth above and in the record, Mr. Sanders respectfully moves this Honorable Court in (good faith), and in the interest of justice, to reverse the Circuit Courts Jan. 20, 2021 decision and order, and the Claims Board March 31, 2020 decision; and reverse in part, the Claims Board Feb. 12, 2020 decision, in the above case matter, and the Grant the following relief:

Issue an Order ordering:

- 1.) That the Claims Board address and/or forward Mr. Sanders' additional compensation claim to the Legislature for decision.
- 2.) Grant any other relief the Court deems fair and proper in the interest of justice.

Dated this 19th day of September 2021.

Respectfully submitted



Derrick Sanders  
2803 Riverside Parkway, Apt. 5401  
Grand Prairie, TX 75050  
Pro Se Appellant.

## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7221 words.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

CERTIFICATION PURSUANT TO  
SECTION 809.19(8)(b), STATS.

I hereby certify that filed with this brief, as part of this brief, is an appendix that complies with section 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) portions of the record essential to an understanding of the issues raised, including written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all opposing parties.

Date: Sep. 19, 2021

Derrick A. Sanders  
Derrick A. Sanders

Pro-Se Appellant