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COMPENSATION UNDER THE MICROSCOPE:

WASHINGTON

What Does Washington Do About Dual-Eligibles?

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Introduction

Imagine that an exoneree, let's call him John Smith, was wrongly convicted in a state with a compensation statute and that he spent 10 years in prison. Assume that, if Smith proves his case, the state compensation statute requires the state to pay him \$50,000 per year of wrongful incarceration, a total of \$500,000. In addition to his state statutory claim, Smith may also have evidence supporting a federal civil rights lawsuit against a municipal entity and law enforcement officers based on evidence that police coerced Smith's confession and fabricated evidence against him. Assume that, in Smith's state, civil rights plaintiffs who prevail in federal lawsuits by obtaining a settlement or jury verdict receive an average of \$300,000 per year of incarceration.

As explained in the National Registry of Exoneration's "[Compensation for Exonerees: A Primer](#)," state statutory compensation statutes are "no fault" statutes. An exoneree does not have to prove that government misconduct caused the wrongful conviction. They do need to prove their innocence. Successful claims are paid from state funds.

Federal civil rights cases are different. These cases usually are brought against municipalities and their employees (but sometimes against state entities or officers) and require a plaintiff to prove that the defendants engaged in unconstitutional misconduct that violated their right to a fair trial. Any resulting awards from settlement or trial verdict are paid by the municipality (on its behalf or through indemnification of an employee) and/or their insurers.

In considering Smith's options, his attorney must assess the chances of prevailing in each of these two approaches, the costs incurred in pursuing these claims, and how long it will take to resolve them. As shown in the Registry's "[Compensation by the Numbers: State Statutory Compensation](#)," and "[Compensation by the Numbers: Federal Civil Rights Lawsuit Compensation](#)," charts, the likelihood of winning a state compensation case is much higher than winning a federal civil rights case. However, average state compensation awards are significantly lower. At the same time, civil rights cases generally are also more expensive to litigate and take longer to resolve.

Smith's attorney will also need to determine whether Smith's state permits him to pursue recoveries under *both* state statutory and federal civil rights theories. States have addressed this question in a range of ways. Some, like California, New York and Illinois¹ have statutes that do

¹ Other states permitting dual eligibility (or at least not expressly barring it by statute) include: Alabama, District of Columbia, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, New

not forbid two recoveries.² We'll call exonerees in those states "dual-eligible" exonerees and those states "dual-eligibility" states.

Some states, like Texas³ and, as we shall see, Washington, permit only one recovery. We'll call these states "single-eligible" states.⁴

Generally, statutes in single-eligible states say that if exonerees have already received compensation from a civil rights or tort case arising from their wrongful conviction, they are barred from seeking state statutory compensation. These states also say that if exonerees want state compensation, they must release or waive their rights to file civil rights cases (or to dismiss them if pending). These statutes pose a difficult choice for exonerees and their lawyers: do they take the often faster, but (on average) less generous state compensation or do they pursue a less certain and more arduous, but potentially higher-yielding, civil rights claim?

There are yet other states, often those which have more recently enacted compensation statutes, which take a hybrid approach. These hybrid states provide compensation to those exonerated who meet all statutory requirements after passage of the statute. With some exceptions, they also permit those exonerated *before* the statute was enacted to seek state compensation. Before state statutes were enacted, the only way (except for a private legislative bill) an exoneree could be compensated was through a federal civil rights claim. Some did not file. Others filed and either recovered or did not.

Hampshire, North Carolina, Oklahoma, Tennessee, Utah, West Virginia and Wisconsin. Tennessee has a seemingly unique statute which gives it a right of subrogation to sue any person who intentionally engaged in acts that caused a wrongful conviction. Tenn. Code Ann. § 9-8-108(a)(7)(G). This places the burden on the state to recover rather than the exoneree to reimburse the state from any subsequent civil rights award.

² State common law might require a recovery in the first case to be offset against one in a second case, but this common law doctrine is outside the scope of this Article.

³ Whether this is actually true in Texas will soon be decided by the Texas Supreme Court. The U.S. Court of Appeals for the Fifth Circuit has certified to the Texas Supreme Court the question of whether Alfred Brown's state compensation award precludes a civil rights lawsuit filed *before* the state claim. *Brown v. City of Houston*, 2022 U.S. App. LEXIS 8934 (5th Cir. Apr. 1, 2022).

⁴ There are some variations in this category, but Connecticut, Florida, Missouri and Rhode Island require those who receive state statutory compensation first to waive their right to file a subsequent civil rights or torts case arising from the wrongful conviction. The Hawaii and Iowa statutes state that state compensation is the "exclusive remedy" for anyone seeking compensation for a wrongful conviction. Indiana, Montana and Virginia require a waiver and also bar anyone who previously received a recovery in wrongful conviction compensation suit from seeking state compensation. The Vermont statute says that receipt of compensation bars future claims against the state, but says nothing about municipalities.

These hybrid state statutes deal with two categories of exonerees. Category 1 people receive state compensation first and then seek a federal civil rights award. Category 2 people get a civil rights award first and then seek state compensation. A number of these hybrid statutes permit Category 1 people to pursue their civil rights claims but require them to repay the state if they recover.⁵ Most of these states also permit those who were *previously* awarded a civil rights or tort recovery in an amount less than the state compensation amount to recover the difference.⁶

Litigation in Washington state pitted advocates for a number of exonerees who argued that Washington was a hybrid state against the state. The courts sided with the state.

Washington State – The Statute

Washington's wrongful conviction compensation statute, Rev. Code Wash. § 4.100.010 *et seq.*, took effect on July 28, 2013. It permitted both people previously exonerated in Washington and those who would be exonerated in the future to seek compensation. The Washington State legislature's intent in passing the statute is set forth plainly:

The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped of their lives and liberty, they are forced to endure imprisonment and are later stigmatized as felons. A majority of those wrongly convicted in Washington state have no remedy available under the law for the destruction of their personal lives resulting from errors in our criminal justice system. The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration.

Rev. Code Wash. § 4.100.010 (2013).

The highlighted sentence suggests that the legislature intended the statute to provide a gap-filling remedy for previously exonerated Washington defendants. The sentence does not, however, express an intent to bar previous civil rights case winners from seeking state compensation. For future exonerees, the intent is also murky. It is very easy to determine who never filed a civil rights case or lost one. Future exonerees, however, will not know whether they lack viable civil rights cases until they either fail to file before the statute of limitations expires or they lose a filed case. The legislature's intent in this sentence about when future exonerees may file state and/or civil rights cases is not clear. Nor does it clearly express an intention to bar dual-eligibility.

In Washington, claims for compensation are filed by complaint in Superior Court. *Id.* § 4.100.030(1). Plaintiffs must demonstrate that they were convicted of a felony and sentenced to a

⁵ These states include Colorado, Idaho, Kansas, Maryland, Michigan, Nevada and Ohio. Minnesota and New Jersey law say that a future award is to be offset by the amount of the prior state payment.

⁶ Colorado, Idaho, Kansas, Maryland, Nevada, Ohio and Rhode Island.

term of incarceration. *Id.* § 4.100.040(1)(a), .060(1)(a). The plaintiff must also prove that they were either pardoned by the Governor on grounds “consistent with innocence,” *id.* § 4.100.040(1)(c)(i), .060(1)(c), or that:

The claimant’s judgment of conviction was reversed or vacated and the charging document dismissed on the basis of significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried and the charging document dismissed.

Id. § 4.100.040(1)(c)(ii), .060(1)(c)(ii).

In addition, the plaintiff must prove that they did not engage in any of the illegal activity charged, *Id.* § 4.100.040(d), .060(d), and that they “did not commit or suborn perjury, or fabricate evidence to cause or bring about his or her conviction.” *Id.* § 4.100.040(e). If a judge or a jury finds that the plaintiff proved by clear and convincing evidence that they were wrongly convicted, the court will direct the state to pay the plaintiff \$50,000 per year of wrongful incarceration (adjusted for inflation), including pretrial detention time, \$25,000 per year on parole or as a registered sex offender, the cost of child support payments accruing while in custody, and reimbursement for restitution, fees, costs, and assessments paid, and attorney’s fees. *Id.* § 4.100.060(5).

In addition, at the time of exoneration or pardon, the exoneree must be provided a copy of the wrongful conviction compensation statute. *Id.* § 4.100.070. This makes them aware of their right to file for state compensation. Those exonerated prior to the enactment of the statute had three years from the statute’s effective date — July 28, 2013—to file a complaint. *Id.* § 4.100.090. There is no statutory mechanism for notifying potential claimants of the new statute. Those exonerated after the enactment of the statute have a three-year statute of limitations in which to file. *Id.*

Interpretation of the Washington State Statute

Three Washington cases have posed questions about what the statute intended to do about those who contended that they were dual-eligibles. *Larson v. State* started as a Category 1 case. Three exonerees, Robert Larson, Tyler Gassman, and Paul Statler, sued in state court in 2014 under the then-new compensation statute, the Wrongfully Convicted Persons Act (WCPA). After a bench trial, the judge found that the three had not satisfied their burden of proving their innocence. They appealed.

In the meantime, in December 2015, they filed a federal civil rights suit against Spokane County and two police officers. In June 2016, the Washington Court of Appeals reversed the dismissal of the WCPA case, holding that the state court judge applied the wrong standard of innocence. *Larson v. State*, 194 Wn. App. 722, 725, 375 P.3d 1096, 1098 (Wash App. 2016).

While the state compensation claim was being litigated in state court, Spokane County moved to dismiss the federal civil rights case, relying on Rev. Code Wash § 4.100.080(1):

It is the intent of the legislature that the remedies and compensation provided under this chapter shall be exclusive to all other remedies at law and in equity against the state or any political subdivision of the state. As a requirement to making a request for relief under this chapter, the claimant waives any and all other remedies, causes of action, and other forms of relief or compensation against the state, any political subdivision of the state, and their officers, employees, agents, and volunteers related to the claimant's wrongful conviction and imprisonment. This waiver shall also include all state, common law, and federal claims for relief, including claims pursuant to 42 U.S.C. Sec. 1983. A wrongfully convicted person who elects not to pursue a claim for compensation pursuant to this chapter shall not be precluded from seeking relief through any other existing remedy. The claimant must execute a legal release prior to the payment of any compensation under this chapter. If the release is held invalid for any reason and the claimant is awarded compensation under this chapter and receives a tort award related to his or her wrongful conviction and incarceration, the claimant must reimburse the state for the lesser of:

(a) The amount of the compensation award, excluding the portion awarded pursuant to RCW 4.100.060(5) (c) through (e); or

(b) The amount received by the claimant under the tort award.

Spokane County's motion appeared to have some merit based on the first highlighted portion of the statute which says, in effect, that a claimant waives a federal civil rights lawsuit (and all other claims) simply by *requesting* state money. It does not say that they have to *receive* it. That interpretation, requiring a claimant to elect a remedy very early, would place substantial pressure on a prospective claimant. Someone like Smith would face a difficult choice between pursuing a state award and a federal civil rights claim.

The federal court denied the state's motion to dismiss, noting that the state conceded that the statute was "not a model of clarity." The court agreed that the statute forbade dual-eligibility, but held that Larson, Gassman and Statler were not barred from pursuing their civil rights case until they executed a legal release prior to the payment of state compensation. The court relied on the second highlighted passage of the statute to relieve the plaintiffs of having to decide which remedy to receive until they got the first one. *Statler v. Spokane Cnty*, 2016 U.S. Dist. LEXIS 128288 (E.D. Wash. Sept. 20, 2016).

Ultimately, in April 2017, a state court judge found the men eligible for state compensation of \$50,000 per year of wrongful incarceration—\$710,000 each. In June 2017, the plaintiffs' federal civil rights case was settled for what amounted to \$750,000 for each man.

To effectuate their apparent dual-eligibility, the plaintiffs quickly asked the state judge to enter a judgment on their WCPA claim, which apparently had not been done in April. At that point, Washington viewed it as a Category 2 case and asked the state court judge to vacate the state award. The state argued that receipt of the civil rights settlement precluded the state remedy because it was "exclusive" to all other remedies. Ultimately, the judge agreed, and the plaintiffs appealed.

On appeal, the Washington Court of Appeals first held (as did the federal judge earlier) that the WCPA permitted plaintiffs to pursue both remedies concurrently. It focused on the second highlighted passage in Section 4.100.080 that the claimant must sign a legal release before receiving state money. The court reasoned that such a release would not be needed if the plaintiff had, upon filing, already waived all other remedies.

The court then entertained plaintiffs' argument that the WCPA created "a narrow, *prospective* waiver of remedies by conditioning the payment of compensation on a release of *future* claims, actions, or proceedings." *Larson v. State*, 9 Wn. App. 2d 730, 739, 447 P.3d 168, 173 (Wash. App. 2019). Since the civil rights suit was filed and settled *before* the state payment, the plaintiffs argued, the waiver or release did not apply. According to the plaintiffs, since they received the civil rights settlement first (this is a Category 2 case), it was impossible to waive those claims or execute a legal release. It was, they argued, too late.

While a clever argument, the response by the Washington Court of Appeals was — exactly. The inability to waive or release those now-paid federal claims did not open the door to state payment; it closed it. According to the court, a required *condition* for getting state money is signing a release. Since the plaintiffs could not do that, the condition for getting state compensation was not satisfied. For the court, that result was consistent with the legislature's goal to compensate those without other recourse.

Although the statute is confusing about *when* the bar on Category 1 dual-eligibility kicks in, it is not difficult to read the statute and accompanying legislative intent to conclude that such a bar exists. The *Larson* court's holding that the same language that precludes Category 1 dual-eligibility also bars Category 2 dual-eligibility rests on less firm grounds.

It makes sense, although perhaps not good policy, for a state to condition receipt of state compensation on the release of *future* federal civil rights claims. That bars Category 1 dual-eligibility. But, Washington's release provision does not work when the civil rights compensation has already been received. A retroactive release of such claims is not possible. Larson, Gassman and Statler argued, unsuccessfully, that meant they should keep both awards.

Given the muddy language of the statute, one other plausible interpretation, raised by neither party, would rely upon the last section of Section 4.100.080. This would require the civil rights case winners to reimburse the state for the civil rights award or the state award, whichever is less. That outcome would modestly help the three plaintiffs. They would get \$750,000 each from the state and repay \$710,000. And, they would also be entitled to other benefits allowed by the statute.

Plaintiffs in two subsequent cases tested the *Larson* court's reasoning, but to no avail. In 2021, the Washington appeals court, in *Green v. State*, 2021 Wash. App. LEXIS 649 (Wash App. Mar. 23, 2021), arrived at the same conclusion as the court in *Larson*. Meredith Town and Doris Green were among [many wrongly convicted](#) people in a spate of child sex abuse hysteria cases in Chelan County. In 2001, well before the WCPA was enacted, they had settled federal civil rights claims against the county and the city of Wenatchee and others for \$325,000 and \$162,500,

respectively. For Town, that was more than he could have gotten under the later-passed WCPA and for Green, less.

In 2016, just before the expiration of a three-year statute of limitations for those exonerated before the statute was enacted, Green and Town filed WCPA claims. There was a different wrinkle from the *Larson* case. In *Larson*, the plaintiffs chose to pursue both claims roughly simultaneously after the statute was enacted. In *Green*, the civil rights cases were filed years before the WCPA was passed.

That distinction made no difference. The court held in *Green*, as it did in *Larson*, that “their receipt of [civil rights] compensation prevents them from providing an effective waiver and legal release of their claims, a condition precedent for receiving compensation under the WCPA.” 2021 Wash. App. LEXIS 649 at *7-8 (Wash. App. 2021). As a result, their WCPA claims were dismissed.

That brings us to *Allen v. State*, a case brought by Donovan Allen who was wrongfully convicted of murder and exonerated based on DNA evidence. In October 2017, Allen brought a federal civil rights case against the city of Longview and several employees. In December 2018, he filed a WCPA case. In January 2019, he settled the civil rights case for \$3 million. This is another Category 2 case, seemingly just like *Larson*. Like *Larson*, the trial court dismissed the WCPA case.

On appeal, the court addressed Category 1 and 2 cases, holding, consistent with *Larson*, that “a person must relinquish their right to receive non-WCPA remedies if a person elects to pursue a WCPA claim. Conversely, if a person elects a non-WCPA remedy, then they relinquish their right to proceed under the WCPA because they cannot provide their required statutory waiver which effectuates the exclusive remedy provision.” *Allen v. State*, 19 Wn. App. 2d 895, 911, 498 P.3d 552, 560 (Wash. App. 2021). Allen could not provide the waiver and thus could not seek state compensation.

Judge Bradley Maxa dissented. He characterized the WCPA as a “somewhat confusing scheme,” *id.* at 914, but said it was clear that the statute applied to Category 1 cases. *Id.* at 915. He found, however, no language in the statute governing Category 2 claims: “. . . nothing in RCW 4.100.080(1) prohibits a person from settling claims against the State and its political subdivisions and then filing a WCPA claim.” *Id.*

Judge Maxa expressed concern about someone like Doris Green, whose old civil rights settlement was much less than her prospective state compensation award: “. . . consider the case where an unrepresented person just released from prison enters into a de minimis settlement with a third party. Under the majority’s interpretation, the person would be barred from *any* recovery under the WCPA. I do not believe that the legislature intended such a draconian result.” *Id.* (emphasis in original).

Allen did not appeal, so the Washington Supreme Court did not have an opportunity to consider Judge Maxa’s conclusion that Category 2 dual-eligibles would be allowed. Thus, the

courts in Washington have interpreted the statute's ambiguous statutory language to prohibit dual-eligibility.

Washington State – The Data

As of November 1, 2022, 51 people were listed in the National Registry of Exonerations as wrongly convicted in Washington state courts since 1989. The Washington statute was passed in April 2013 and provided that those exonerated prior to that could file applications for compensation by July 28, 2016. Rev. Code Wash. § 4.100.090.

Of those 51 people, four served no time in prison after their conviction and thus were not eligible for state compensation, leaving 47 potentially eligible. Only 22 of those 47 people, about 47%, sought compensation, a figure somewhat lower than the national average of 53%.

Why did the 25 remaining people not seek state compensation? As always, it is difficult to know, but some patterns are noteworthy.

- Five exonerees⁷ who were exonerated prior to the passage of the statute were incarcerated for less than a year in prison. It makes intuitive sense that those with short incarcerations who were exonerated prior to the passage of state statute (and without the benefit of the notice provision) would be less likely to seek state compensation. None of these five filed federal civil rights cases.
- Three exonerees⁸ died or were deported years before the compensation statute was passed. None of these three filed federal civil rights cases.
- One⁹ was convicted of an unrelated crime for which he served a term of imprisonment during the period of his wrongful conviction. The statute prohibits compensation in such instances. Rev. Code Wash. § 4.100.040(1)(b)(ii), 040(4), 060(b)(ii).
- One¹⁰ was wrongly convicted of murder and exonerated in 2001, more than a decade prior to the passage of the statute.
- Three¹¹ were exonerated shortly before or after the statute was passed and did not seek compensation for unknown reasons. None of them filed civil rights cases.
- Eleven people¹² received civil rights or attorney malpractice awards prior to the passage of the statute and were, as the Washington courts interpreted the statute,

⁷ Gabriel Baddeley, Ollie Church, Mark Clark, Jeff Schmieder, and Reshenda Strickland.

⁸ Benjamin Harris, John Jackson, and Sophia Johnson.

⁹ Jeramie Davis.

¹⁰ David Kunze.

¹¹ Homer Taylor, Olga Shved, and Patrick McAllister.

¹² Connie and Henry Cunningham, Larry Davis, Carol and Mark Doggett, Harold and Idella Everett, Ralph Gausvik, Alan Northrup, Manual Rodriguez, and Clyde Spencer.

barred from seeking compensation. A twelfth exoneree, Michael Rose, was exonerated in 2002 and lost his civil rights case.

- Of those 11 successful civil plaintiffs, our data show that four had earlier civil rights awards that were lower than the Washington compensatory metric.

Of the 22 exonerees who did file for state statutory compensation, the results as of October 2022, were:

Compensation Granted	Claims Pending	Claims Denied
9 - total paid \$2,631,946	5	8

As of October 2022, 40% of Washington exonerees who filed claims had been compensated under the state statute, which was far less than the 71.5% national average. Only 19% of all Washington exonerees were compensated, which is less than half of the national average of 41%. Eight claims were denied. That is no surprise. The three Washington cases discussed above involved six (Larson, Gassman, Statler, Green, Town and Allen) of those eight people. One other, Joseph Reichert, was denied because he was not sentenced for the crime for which he was wrongly convicted, which is required by Rev. Code Wash. §4.100.040(a), .060(a). The other, James Simmons, filed a complaint, but it was dismissed for reasons that are not clear.

Conclusion

With respect to its compensation statute, Washington is among the states with the lowest filing percentages, lowest percentages of success, and the lowest percentage of lost years compensated compared to other states.

If we had to point to a particular cause for Washington’s appearance in the bottom tier of states, it would be the ban on dual-eligibility. Does that mean that Washington’s statute has been a failure? Not necessarily, because the legislative goal appears to have been to employ the state statute as a gap-filler—a road to compensation for those who have no apparent civil rights remedy. If there have been considerable numbers of civil rights awards, the state statute may be seen to have largely accomplished its mission.

Of the 51 Washington state exonerees in the Registry, 21 sought a civil rights award. That’s about the national average. However, considering the ban on dual-eligibles and that fourteen of the 51 have won state compensation or have claims pending, the rate of civil case filing is comparatively high. Of those 21 filed cases, 16 received a civil rights recovery,¹³ a rate of success well above the national average of 52%.

Of the 30 who did not file a civil rights case, 14 pursued the alternative state remedy instead. Of the remaining 16, three were not incarcerated, five were incarcerated rather briefly,

¹³ Four cases were dismissed, and one remains pending. Of the four dismissals, one received state compensation, one spent no time in jail, and one won a separate case against his attorney for malpractice.

and three had died or were deported. There is no obvious explanation for non-filing by the five others.

All told, about 59% of the years lost to wrongful conviction in Washington have been subject to some form of compensation, which is the national average. Washington's modest record of state compensation is offset in part by a significant number of civil rights awards, many received prior to the passage of the statute. Put in this context and given the legislature's goal that the statute serves as a remedy for those without viable civil rights cases, Washington's state compensation statute has not fared as poorly as the numbers initially suggest.