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## Compensation Under the Microscope: Michigan

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## COMPENSATION UNDER THE MICROSCOPE: MICHIGAN

### Why Does Michigan Deny So Many State Compensation Claims and What Is It Doing About It?

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#### Introduction

The number of exonerees denied compensation in Michigan – 25 – is the third highest in the country, behind New York and California. As of this writing, there are 107 Michigan exonerees listed in the National Registry of Exonerations who have filed for state compensation. By comparison, of the 88 exonerees who filed in Ohio, only six have been denied. The purpose of this article is to analyze why the number of denials in Michigan is as high as it is.<sup>1</sup> Part of the answer lies in a particularity of the Michigan compensation statute. The Michigan legislature is, however, considering significant amendments to the statute. This article considers the extent to which those amendments might change the outcomes in some of these 25 cases.

#### The Michigan Wrongful Incarceration Compensation Act

Michigan's wrongful conviction compensation statute, MCLS §§ 691.1751 *et seq.*, also known as the WICA, was passed in 2016 and took effect on March 29, 2017. Persons seeking compensation under the WICA file their claims with the Michigan Court of Claims. MCLS § 691.1753. The Michigan legislature created the Court of Claims to hear civil actions filed against the State of Michigan and its agencies. The Court of Claims is part of the Michigan Court of Appeals. Four appeals court judges are assigned by the Michigan Supreme Court to serve on the Court of Claims.

The WICA requires the plaintiff to prove three things, each by clear and convincing evidence. *Id.* § 691.1755(1). First, they must show that they were convicted of one or more state crimes, were sentenced to a term of imprisonment and that they served part of the sentence. Second, the plaintiff must show that their conviction was reversed or vacated and either the charges were dismissed or on retrial they were found not guilty. Third, they must show that “[n]ew evidence demonstrates that the plaintiff did not perpetrate and was not an accessory or accomplice to the acts that were the basis of the conviction, *results* in a reversal or vacation of the judgment of conviction or a gubernatorial pardon, *and results* in either the dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.” *Id.* (emphasis added).

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<sup>1</sup> For an article focusing on delays in the receipt of wrongful conviction compensation awards, see Anna Clark, *They Were Wrongfully Convicted. Now They're Denied Compensation Despite Michigan Law*, PRO PUBLICA (Jan. 2, 2024), <https://www.propublica.org/article/why-michigan-failing-compensate-wrongly-convicted-despite-law>.

There is no legislative history explaining the purpose or need for Michigan’s unique “new evidence” requirement.

This third statutory requirement of “new evidence” has proven a barrier to a number of exonerees. WICA defines “new evidence” as “any evidence that was not presented in the proceedings leading to plaintiff’s conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff’s conviction.” “New evidence” does not, however, include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecutor agrees that “the recantation constitutes new evidence without other evidence to support the recantation.” MCLS § 691.1752(b).

The “new evidence” requirement effectively has two parts. First, the claimant must present “new evidence” – evidence not presented in their criminal trial. Second, if new evidence is presented, it must, by clear and convincing evidence, demonstrate innocence, have resulted in a reversal of the conviction *and* have resulted in the dismissal of charges or an acquittal on retrial. This report will refer to these latter new evidence requirements 1, 2 and 3.

Michigan By the Numbers

The National Registry of Exonerations lists 171 persons wrongly convicted in the state courts of Michigan who were exonerated prior to October 1, 2023. As noted in Table 1, below, of those, 157 were potentially eligible for state compensation.<sup>2</sup> As of July 2024, 107 state compensation claims were filed in Michigan by persons listed on the National Registry of Exonerations. One has not yet filed, but the statute of limitations still permits them to do so. Of the 107 petitions filed, 77 exonerees received compensation by the court or by settlement. Five remain pending either before the Michigan Court of Claims or on appeal of a judgment issued by the Court of Claims. Michigan has awarded nearly \$52 million in compensation. That \$52 million was paid to exonerees who together experienced nearly two-thirds of the years lost to wrongful incarceration of all Michigan exonerees, a percentage which is well above the national average.

Exonerees	Claims Filed	Claims Unfiled	Premature	Granted	Pending	Denied
157	107	49	1	77	5	25

**Table 1**

Not infrequently, in Michigan and elsewhere, state compensation claims are filed, but either dismissed by a court or administrative body on procedural grounds or by the plaintiff themselves. Although the dismissal is not based on the merits of the claim, we code it as a denial. Two cases appear to have been denied on procedural grounds: Thomas Foley’s case was

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<sup>2</sup> The fourteen other exonerees were not incarcerated.

dismissed because his lawyer failed to substantiate the claim adequately.<sup>3</sup> Frederic Mardlin’s claim was dismissed after he died. The WICA does not permit an estate or heirs to bring claims or substitute as plaintiffs.

Plaintiffs sometimes dismiss state claims if they first win a settlement or award in a federal civil rights case. In a state like Michigan, where the plaintiff must repay the state from a civil rights award, MCLS § 691.1755(8), plaintiffs may dismiss the pending state compensation claim when their civil rights case is resolved for an amount higher than that which they could expect to receive from the state. Four exonerees dismissed cases for this reason, which do not reflect a decision on the merits of the claim.<sup>4</sup>

Like most state compensation statutes, Michigan bars compensation for time in which the exoneree was lawfully imprisoned concurrently for other crimes. MCLS § 691.1755(4). Four exonerees were denied compensation on this ground.<sup>5</sup> Thus, 10, or 40 percent, of the Michigan denials can be attributed to causes other than a statutory quirk or other than a determination that the claimant had not proven their factual innocence.

The remaining 15 cases fall into two categories. The first, unique to the Michigan statute, requires that “new evidence” result in the reversal or vacatur of the conviction. The second is partially a creature of Michigan’s “new evidence” language, but also familiar to virtually all state compensation statutes – that the plaintiff demonstrate their innocence.

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<sup>3</sup> The Court of Claims dismissed the claim by Thomas Foley because his attorney failed to provide a transcript of, or specific citations to, testimony contained within a 13-day video of the trial. *Foley v. State of Michigan*, Case No. 17-000150 (O’Brien, J.). The result here was due to poor lawyering rather than a ruling on the merits.

<sup>4</sup> Derrick Bunkley, Jimmie Nelson, Lorinda Swain, and Bernard Young.

<sup>5</sup> Anthony Legion, 2023 Mich. App. LEXIS 5313 (Mich. App. July 27, 2023); Michael Powels, Case No. 19-000088 (Murray, J.), Kurtis Showers, Case No. 17-000307 (Murray, J.) and Feronda Smith. Case No. 20-000179 (Kelly, J.).

In rejecting Feronda Smith’s claim on this ground, the court relied on the Michigan Court of Appeal’s decision in *Ricks v. State of Michigan*, which was subsequently overturned by the Michigan Supreme Court. 508 Mich. 387 (Mich. 2021). Alternatively, the court held Smith’s convictions were not based on “new evidence.” Smith’s convictions for felony murder and armed robbery were reversed because the prosecution failed to correct false trial testimony by a co-conspirator that he was not paid by the government for his testimony. While he was awaiting a new trial, Smith obtained new results from previously inconclusive DNA tests showing that the DNA left at the murder scene was that of his co-conspirator, not Smith. Because the DNA evidence was not a basis for the reversal of the conviction or the prosecutor’s decision to dismiss the case, Smith failed to establish new evidence requirements 2 or 3.

## “New Evidence” and Reversal

The first category of cases was the subject of a blunt opinion by Justice Bridget McCormack, the former Michigan Supreme Court Chief Justice, in which she reluctantly concurred with the Michigan Supreme Court’s decision to deny review of a Court of Appeals decision in a WICA case. In that case, the exoneree’s conviction was vacated, but not because of the discovery of new evidence after the wrongful conviction. *Perry v. State*, 982 N.W.2d 398 (Mich. 2022). Justice McCormack suspected this precluded compensation in numerous cases and urged the legislature to amend the WICA: “I don’t like administering legal rules that I can’t explain to the people they impact. Please fix it, legislators.” *Id.*

The notion of “new evidence” is not a foreign one to the National Registry of Exonerations. In fact, it is a requirement of entry. The Registry’s definition of “exoneration” requires that the pardon, acquittal or dismissal of charges that relieves the person of the consequences of their criminal conviction follow “evidence of innocence [that] became available that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known by the defendant and the defense attorney at the time the plea was entered.” Given the seemingly common requirement of “new evidence” for entry into the Registry and for WICA compensation, how can a Michigan exoneree qualify for the Registry, but not state compensation because they fail the “new evidence” requirement?

The answer lies in causation. For the Registry, an exoneration requires there to be evidence of innocence that was not presented at the time of conviction. It does not require that the exoneration is *based on* that new evidence. For Michigan, it does. An example may help us to understand this subtle distinction.

In 2007, Dennis Tomasik was convicted of sexual assault of a minor. What followed was a very complicated series of appeals and remands. Of importance here is that, in 2015, the Michigan Supreme Court reversed Tomasik’s conviction on the grounds that the trial court erred by admitting into evidence a recording of Tomasik’s police interrogation. *People v. Tomasik*, 498 Mich. 953; 872 N.W.2d 488 (Mich. 2015). Tomasik had also asked the Michigan Supreme Court for a new trial on the grounds that newly discovered expert reports impeached the complainant’s testimony. The Supreme Court, however, declined to rule on the new expert report argument because it granted him the relief he sought on evidentiary error grounds. On retrial, Tomasik was acquitted.

The National Registry of Exoneration’s description of the [Tomasik](#) case makes it abundantly clear why Tomasik qualified for the Registry. In addition to the new expert reports casting grave doubt on the alleged victim’s veracity, Tomasik’s lawyers called 22 new witnesses to testify at his retrial. They were not presented at the first trial.

He later filed a WICA claim for compensation. The claim was denied. On appeal, the Michigan Court of Appeals regarded the language of § 691.1755(1)(c) to be unambiguous. *Tomasik v. State*, 327 Mich. App. 660, 935 N.W.2d 368 (Mich. App. 2019). It explained that the italicized verbs in the summary of the statute above mean that new evidence must 1) demonstrate innocence, 2) result in reversal of the judgment *and* 3) result in the dismissal of all charges or a

finding of not guilty on retrial. Each of these verbs are causation verbs and they are joined in the statute by the conjunctive word “and.” Here, Tomasik fell short on new evidence requirement number 2. The new expert evidence was not *the basis* for the reversal of the judgment; the evidentiary error in admitting the interrogation recording was.

Tomasik appealed and the Supreme Court denied review. *Tomasik v. State*, 505 Mich. 956, 936 N.W.2d 829 (Mich. 2020). Chief Justice McCormack concurred, reluctantly agreeing that the Court of Appeals interpretation of the statute was correct. But, she viewed the result as contrary to legislative intent. She encouraged the legislature to consider fixing the statute to allow a group of plaintiffs she called “new evidence plus-ers” to seek WICA compensation.

Justice McCormack noted that had Tomasik just sought a new trial on the new evidence grounds and won, he would be eligible for WICA. *Tomasik*, 936 N.W.2d at 956 (McCormack, C.J., concurring). That is, of course, true, but criminal defense attorneys do not restrict their requests for relief only to the grounds that might result in compensation should they win. Instead, they will advance all of the arguments they can in the hope that one of them finds favor with the court. When a court has multiple arguments to consider, it frequently does not rule on all of them (unless all are rejected). If one is a winner, the others may not even be considered because a ruling is unnecessary.

In *Perry*, Chief Justice McCormack made, as we saw, the same pitch. Perry’s rape conviction was reversed because his ineffective counsel failed to object to the prosecutor’s repeated misconduct and failed to call defense witnesses. On retrial, those witnesses were called and Perry was acquitted. The new evidence offered by these witnesses qualified Perry for entry into the Registry, but was not good enough to satisfy the WICA. New evidence did not result in the reversal of Perry’s conviction. Prosecutorial misconduct and ineffective assistance of counsel did. Like Tomasik, Perry failed new evidence requirement 2.

For Justice McCormack, wrongful convictions are the product of multiple systemic errors: “an ineffective lawyer, evidence withheld by police or prosecutors, junk science, a trial court reluctant to gatekeep effectively.” *Perry*, 982 N.W. at 399. As she observed, some of these errors fall neatly into the “new evidence” category, but many do not. Just because the convictions of Perry and Tomasik were reversed for reasons other than new evidence did not mean for Justice McCormack that they “were *less* wrongfully incarcerated than those eligible for compensation under the WICA.” *Id.*

Justice McCormack has a fair point. So long as a petitioner’s conviction was reversed or vacated, why should it matter whether it was because of the discovery of new evidence or for some other legitimate reason? After all, the petitioner still needs to establish, by clear and convicting evidence in Michigan, that they are innocent. Arguably, that requirement for compensation is also more difficult to surmount in Michigan than in other states because in Michigan it must be “new evidence” that demonstrates innocence.

Given the Michigan Supreme Court’s approach to the *Perry* and *Tomasik* cases, the outcome of the subsequent David Maples case was predictable. Maples and two co-defendants were charged with cocaine distribution after the three met in a bar. Outside the presence of Maples, one of the co-defendants sold cocaine to an undercover officer. By the time of trial, the seller had pled guilty and promised not to testify for Maples. The other co-defendant, whose charges had been dismissed after a preliminary hearing, could not be found. Without witnesses, Maples pled no contest, and did so after his attorney said he could appeal the case based on a claim of a speedy trial violation.

After pleading guilty, the seller, who had been sentenced to 10 to 20 years in prison, wrote two affidavits attesting to Maples’s innocence. Ultimately, the Sixth Circuit granted Maples’s writ of habeas corpus, holding that he had a viable speedy trial defense and that his attorney’s advice that pleading no contest would not result in a waiver of that defense constituted ineffective assistance of counsel. The state court subsequently vacated his conviction and dismissed the charges.

With respect to the WICA claim, Maples argued that the seller’s affidavit was “new evidence.” The Michigan Court of Appeals, however, held that this affidavit did not result in the vacatur of Maples’ conviction. *Maples v. State*, 2022 Mich. App. LEXIS 4309 (Mich. App. Jul. 21, 2022). Instead, the “but for” cause of the reversal of the conviction that was the Sixth Circuit’s decision that Maples’ fair trial rights were violated as a result of ineffective assistance of counsel on the speedy trial claim. The court acknowledged that the speedy trial violation prejudiced Maples because the delay afforded the seller time to plead guilty and, thus, made him unavailable as a witness for Maples. However, the court held that this factor was just a small part of the speedy trial analysis and, thus, not a “but for” cause of the vacatur. Maples thus also did not satisfy new evidence requirement number 2.

Thus, *Perry*, *Tomasik* and *Maples* are all cases in which the defendant offered new evidence in support of their petitions for post-conviction relief. But other considerations, not the new evidence, were the cause of the reversal of the convictions. Thus, the WICA claim was denied. Without the “new evidence” requirement (number 2), it is not absolutely certain that the three would have won their claims. They would have next to demonstrate their factual innocence with new evidence (new evidence requirement 1). The “new evidence” requirement, however, stood in the way of consideration of innocence.

How many Michigan exonerees have lost their compensation claims because of this “new evidence” requirement? Based on a reading of Court of Claims or Court of Appeals decisions, the answer appears to be seven, although additional cases relied on the “new evidence” requirement as an alternative ground for denying WICA compensation.<sup>6</sup> What happened in those other four cases?

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<sup>6</sup> James Grissom, Terrence Jose, David Maples, Gerald McKenzie, Charles Perry, Jason Sadowski, and Dennis Tomasik.

Terrence Jose was convicted of the sexual abuse of his minor daughter. He and the child's mother were estranged, and Jose tried to establish that the mother remained angry with him to infer that she pressured the child to make false allegations against Jose. Jose's attorneys attempted to establish this continuing anger using text messages, but the trial court excluded them, holding that his lawyers had not authenticated them. On appeal, Jose argued that the court erred in not admitting the texts, and that his lawyers were ineffective in failing to get the texts into evidence. The appeals court granted his motion to remand the case so that he could attempt to make these showings. The government then dismissed the charges on the ground that the child did not wish to testify again.

The Michigan Court of Claims rejected Jose's claim for compensation. Case No. 17-000178-MZ (Talbot, J.). Jose claimed that the text messages were "new evidence," as required by WICA. The Court disagreed, holding that the messages had, in fact, been "presented" to the trial court and, thus, by statutory definition could not be "new." They existed at the time of trial and, according to the court, had simply not been admitted. Alternatively, even if the messages were new evidence, the court held that they did not cause the dismissal of charges. The charges were dismissed because the victim did not wish to testify again. Thus, the texts did not meet new evidence requirement 3.

The *Jose* court's application of the "new evidence" standard is problematic for two reasons. First, if a criminal defendant presents exculpatory evidence at trial, but the court erroneously refuses to permit it to be introduced, the defendant cannot later win a WICA case if, as might well occur, the error led to a reversal of the conviction. Second, not infrequently, a criminal conviction is overturned, and the prosecutor chooses not to retry the defendant on the asserted ground that key witnesses are unavailable, either because they refuse to participate (sometimes the case in sexual abuse cases) or have passed away.

The statute requires the "new evidence" to cause the dismissal of the charges by the prosecutor. Generally, we only know why a prosecutor dismisses charges if they make a public statement. Without one, it could be very difficult to prove that the new evidence caused that decision. If there is an explanation given, one can imagine a prosecutor not attributing the dismissal decision to "new evidence" because it might hint at previous errors – like a sloppy investigation for example - and would support a compensation claim. Rather, they might (or might not) express their view that the exoneree was, in fact, guilty, but cite the age of the case, or unavailability of witnesses as reasons for the dismissal. These statements are not uncommon even in cases with overwhelming evidence of factual innocence.

James Grissom was convicted of sexual assault based largely on the testimony of the complainant. Following his conviction, Grissom's attorneys obtained police reports from California showing that the complainant had made false rape complaints against others. These reports were not provided to Grissom's defense attorney prior to trial. The trial court subsequently granted Grissom's motion for a new trial and the prosecutor declined to retry him.



The Michigan Court of Claims acknowledged that the police reports were new evidence. Case No. 18-000207 (Murray, J.). However, the court held they were inadmissible hearsay, and “new evidence” required by the statute must be admissible at trial.<sup>7</sup> Like in *Jose*, the court added a gloss to the “new evidence” requirement. In *Jose*, presented, but unadmitted evidence is not “new evidence.” In *Grissom*, presented evidence must be admissible to be “new evidence.”

Jason Sadowski was convicted of a number of crimes, including solicitation to commit murder. This conviction was reversed as a result of a Confrontation Clause violation and an error in introducing evidence relating to a handgun. He was acquitted on retrial. Sadowski’s argument under the WICA rested on statutory construction – that new evidence was not required as the basis for the reversal of a conviction. The Michigan Court of Appeals rejected that argument, holding that it was foreclosed by *Tomasik. Sadowski v. State of Michigan*, 2021 Mich App. LEXIS 4519 (Mich. App. July 22, 2021).

Gerald McKenzie was convicted of the murder of his girlfriend’s daughter. Ultimately, the Sixth Circuit granted his habeas petition on insufficient evidence grounds. McKenzie’s WICA petition was dismissed by the Court of Claims. The Michigan Court of Appeals affirmed. *McKenzie v. State*, 2018 Mich. App. LEXIS 3148 (Mich. App. Sept. 18, 2018).

McKenzie argued, in part, that there was exculpatory evidence not admitted in trial. While the Sixth Circuit noted this, as well as his trial attorney’s possible error in not getting it admitted, the Court of Appeals held that the petition for habeas corpus was granted because the court found the evidence that *was* admitted at trial was insufficient. Thus, McKenzie could point to no “new evidence” that caused the reversal of his conviction.

#### A Statutory Fix?

In February 2024, House Bill 5431 was introduced to amend the WICA, and a substitute version was introduced in March, 2024. H.B. 5431, 102nd Leg., Reg. Sess., (Mich. 2024). Some of those proposed changes address the “new evidence” provision and the Michigan Attorney General’s Office testified in favor of those amendments.<sup>8</sup>

Recall the discussion of “new evidence” requirements 1, 2 and 3; *each* of which must be satisfied. The House bill would require a claimant to satisfy *one* of three requirements by a

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<sup>7</sup> The Court held, in the alternative, that even if the reports were admissible, this new evidence did not demonstrate factual innocence by clear and convincing evidence. They constituted impeachment evidence rather than affirmative evidence of innocence, particularly in light of substantial unrefuted evidence of guilt. *Grissom* would have failed to meet new evidence requirement 1.

<sup>8</sup> Anna Clark, Michigan Lawmakers Working to Fix a Program That Failed to Compensate the Wrongfully Convicted, PROPUBLICA (March 26, 2024), <https://www.propublica.org/article/michigan-lawmakers-attempt-fix-wrongful-imprisonment-compensation>.

preponderance of evidence, rather than clear and convincing evidence: 1) new evidence shows they did not perpetrate the crime and the new evidence resulted in the reversal of the conviction or a gubernatorial pardon, 2) the reversal of the conviction was based on insufficiency of evidence and the plaintiff did not perpetrate the crime or 3) “[n]ew evidence was presented to the court that reversed or vacated the plaintiff’s conviction, but relief was granted on another basis” and the new evidence demonstrates the plaintiff did not commit the crime. *Id.* The bill appears to permit those whose claims were previously denied to re-apply for compensation within eighteen months of the statute’s effective date.

The proposal retains the concept and use of “new evidence.” Putting aside the change in the standard of proof, proposed provision 1 essentially restates existing requirements 1 and 2, and deletes requirement 3. That would help those otherwise disqualified by current new evidence requirement 3. (It would eliminate the alternative grounds for the denial of Terrence Jose’s claim.)

Proposed provision 2 covers claimants whose convictions were reversed on insufficiency of evidence grounds and does not require them, and them alone, to offer “new evidence” of innocence. They need only show innocence. This could help Gerald McKenzie. Proposed provision 3 attempts to protect claimants that Chief Justice McCormack was worried about – those whose convictions were reversed on grounds other than new evidence. Whether this proposed language actually does that, however, is questionable.

The bill says new evidence was presented that reversed the conviction – indicating the new evidence caused the reversal – but that relief was granted on another basis, a basis that presumably did not turn on new evidence. Does new evidence have to cause the reversal or not? The wording of that statute is ambiguous and would seem to *not* satisfy Justice McCormack’s plea to “fix it, legislators.” Thus, it is not entirely clear whether the bill would help Tomasik, Perry and Maples, or Jose, Grissom or Sadowski.

If Michigan wishes to retain the new evidence concept, but to respond meaningfully to Justice McCormack, and to potentially compensate those six exonerees, it should simply require the plaintiff to prove their conviction was vacated or reversed – period – and that new evidence demonstrates they are innocent.

#### No Showing of Innocence By Clear and Convincing Evidence

Eight Michigan exonerees<sup>9</sup> lost their claims because the Court of Claims concluded that the claimant failed to satisfy new evidence requirement 1 – new evidence presented did not demonstrate their innocence by clear and convincing evidence. Under the WICA, claimants must not only demonstrate their innocence, but show that the new evidence *establishes* that innocence. Thus, in Michigan, the traditional innocence requirement is intertwined with a Michigan-only

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<sup>9</sup> Chamar Avery, Wayne Dabb, Katherine Dendel, Lynie Gaines, Matthew Holbrook, Troy Thompson, David Tucker and Ledura Watkins.

“new evidence” requirement. One might expect difficulties teasing out these requirements. In reality, in none of the eight cases, described below, did the denial rest on the “new evidence” requirement. Put differently, these cases might well have been decided the same way in other states.

Few wrongful conviction compensation cases are entirely straightforward. If viewed on a spectrum, exonerations that arise from the discovery of new and clearly exculpatory evidence showing innocence, like DNA testing, new evidence of an alibi, or the truthful admission of guilt by the actual perpetrator, are among the easier cases for compensation. Some more difficult cases rest on an evolving understanding of the causes of wrongful conviction, like coerced confessions, or recognition of the flaws of types of forensic evidence, such as hair comparison, bitemarks or the science related to arson and shaken baby syndrome.

Harder are cases in which the exoneration arose from the discovery or reassessment of facts that undermine other essential elements of the government’s case, such as evidence that damages the credibility of a prosecution witness. Yet more difficult are cases in which the exoneration was the result of procedural error, like errors in the admission of evidence, *Brady* violations and ineffective legal counsel. These errors may justify setting aside a conviction, but they often, alone, do not demonstrate factual innocence. Also difficult are cases in which the exoneration was based on a reevaluation of an affirmative defense, like self-defense or entrapment, where the defendant admits to the conduct alleged.

These eight cases all present sets of facts which are challenging for plaintiffs seeking compensation.

Chamar Avery, 2023 Mich. App. LEXIS 1512 (Mich. App. Mar. 2, 2023).

Avery was convicted of robbery and murder. He filed for and was granted a federal writ of habeas corpus on the grounds of ineffective assistance of counsel: his trial counsel did not adequately investigate and present Avery’s alibi. Avery filed a WICA claim, and the Court of Claims (Murray, J) conducted a trial. At the trial, Avery presented testimony from two people who said that Avery was with them at the time of the murder.

The government presented a witness who testified that she heard a gunshot and saw three men, one of whom was Avery, leave a car in which the murder occurred. In addition, it presented the testimony of a man who had pled guilty to the murder who said that Avery, with one other person, participated in the murder/robbery. Given that testimony, the Court of Claims held that Avery had not demonstrated his innocence by clear and convincing evidence.

On appeal, Avery made procedural arguments. He argued that the Court of Claims erred by conducting a trial and that it could not entertain evidence other than that offered in the hearing in which Avery argued that his attorney was ineffective. The Court of Appeals rejected those arguments.

Avery next offered a more interesting argument – that the plaintiff in a WICA case should be presumed innocent. The government then has the burden of showing the claimant’s guilt by a preponderance of the evidence. If it does, the burden shifts to the claimant to demonstrate his innocence. Many commentators, including this author, have argued that this framework is the appropriate one to evaluate wrongful conviction compensation claims.

The Court of Appeals ruled though, correctly given the structure of the statute, that the burden rests on the claimant to demonstrate innocence by clear and convincing evidence. It does not, the court observed, have a burden-shifting provision.

Wayne Dabb, No. 18-000212 (Murray, J.).

Dabb was convicted of second degree criminal sexual conduct against a male and a female. Dabb’s conviction was set aside, and a new trial ordered on the grounds that the trial judge erroneously excluded evidence that cast doubt on the complainants’ testimony. Dabb proffered evidence that the male had been accused of sexual abuse, evidence relevant to an argument that some people accuse others of crimes to deflect from their own culpability. Similarly, Dabb sought unsuccessfully to introduce evidence of the alleged victims’ sexual relationship and abuse of the female by her father. The government dismissed the charges after the Court of Appeals ordered a new trial.

Dabb argued the excluded evidence was consistent with him not being the offender. However, the Court of Claims held that while the evidence “casted doubt” on the conviction, it was not sufficient to meet the required “clear and convincing” standard. *Id.* at 4–5. The Court relied on the Court of Appeals opinion describing the excluded evidence and held there was nothing in it “to affirmatively show that plaintiff did not commit the crimes.” *Id.* at 6.

So framed, it is difficult to quarrel with the Court’s logic. The erroneously excluded evidence undermined the credibility of the key witnesses against Dabb. It did not show him to be innocent. In the absence of clear and convincing evidence of exculpatory evidence, it is difficult to see how Dabb could demonstrate his factual innocence to the extent necessary to satisfy a wrongful conviction statute in any state.

Katherine Dendel, No. 18-000210 (Murray, J.).

The prosecution’s theory in the murder case against Dendel was that she was frustrated with caring for her ill partner and injected him with a fatal dose of insulin. Dendel’s behavior after the death was also arguably suspicious. She was diabetic (her partner was not) and thus had the means and knowledge required to inject him with insulin. The prosecution’s medical experts testified that the medical evidence was inconsistent with Dendel’s telling of the events on the day of death and, instead, supported the insulin injection theory. Dendel was convicted.

Following her conviction, Dendel argued that her trial counsel was ineffective because he had not called an expert to refute the opinions of the government experts. She presented

testimony from an expert who did not exclude the possibility that the victim died from an insulin overdose but said that medical evidence pointed to other causes of death. Ultimately, the Sixth Circuit granted her habeas relief on the grounds that competent counsel could have raised doubts about her guilt, thus undermining confidence in her conviction. The prosecutor declined to retry her.

The Claims Court denied her claim for WICA compensation. The Court observed that to prevail on her habeas corpus claim, Dendel had to demonstrate only a “reasonable possibility” that, but for her attorney’s ineffective representation, the result of the trial would have been different. Presenting doubt about whether the prosecution, with the new expert, could have proven her guilt beyond a reasonable doubt, falls short of a showing of factual innocence. As the Court put it, “[m]erely offering an opinion that could potentially negate the prosecution's expert witnesses' testimony is a far cry from affirmatively demonstrating innocence.” Opinion at 9.

Dendel’s expert’s equivocal testimony was not helpful to her on the WICA claim. The expert could not exclude the possibility of an insulin overdose. Rather, he opined that the record was consistent with alternative theories to explain the victim’s death. The court did not quarrel with the expert’s report being “new evidence.” But, while it might have created some reasonable doubt of guilt, the court held that it fell short of demonstrating innocence

Lynie Gaines, No. 17-000308 (O’Brien, J).

Gaines pled guilty to possession with intent to distribute, but the guilty plea was set aside during the appellate process once it was found the plaintiff was entrapped by a law enforcement informant. The Court of Claims held the plaintiff could not win his WICA claim because he asserted an entrapment defense. The statute requires claimants to prove that they did not “perpetrate” the acts constituting the crime. The entrapment defense requires admitting committing those acts that are elements of the crime.

This case, too, did not turn on the “new evidence” requirement. It is, instead, a variation of a category of cases throughout the country where a claimant commits a crime which is excused by an affirmative defense, such as self-defense. Claimants tend to lose these compensation claims.

Matthew Holbrook, No. 17-000120 (O’Brien, J).

Holbrook’s conviction for second degree murder and felony-firearm was overturned after the Court of Appeals found his counsel was ineffective for failing to ask that the victim’s clothing be tested for gunpowder residue. Holbrook asserted he acted in self-defense. The presence of gunpowder on the victim would support his argument that the victim fired a weapon. The clothing was then analyzed and tested positive, undermining the prosecution’s claim that the victim was unarmed. Holbrook’s second trial ended in a hung jury, and he was acquitted in the third trial of all charges. He then filed a WICA claim.

The test was new evidence, but the Court of Claims held it supported, but did not prove, Holbrook's innocence. Just because the victim fired a weapon did not necessarily mean Holbrook fired back in self-defense. The Court pointed to evidence inconsistent with that defense, like the fact that the victim was shot in the back, that Holbrook could have retreated, and that Holbrook accompanied an acquaintance to find and possibly confront (or worse) the victim, who allegedly had robbed the acquaintance.

Troy Thompson, 18-000209-MZ (Murray, J).

Thompson was found guilty of second-degree sexual misconduct with a minor who was living in his home at the time of the crime. Thompson challenged the conviction on the ground that his trial attorney failed to call an expert witness who had prepared a report. That expert, a psychologist, had reviewed transcripts of the police interviews of the alleged victim. She had concluded that the police investigators used suggestive questioning techniques inconsistent with the state's interrogation standards and that those techniques may have led the alleged victim to make false statements. Thompson's motion for a new trial was granted and the prosecution dismissed the case.

The psychologist's opinion was "new evidence." The Court of Claims held, however, that it merely undermined the victim's credibility; it did not demonstrate Thompson's innocence. The court further observed that the victim had disclosed the alleged assault to her mother before the police interview. It noted the standard for obtaining compensation under the WICA was more demanding than the standard for obtaining post-conviction relief.

David Tucker, No. 18-000213 (Murray, J).

Tucker was convicted of assault with intent to commit great body harm when he allegedly pushed a co-worker into a bathroom after which the co-worker was assaulted by two others. The victim was the prosecution's only trial witness. The conviction was overturned in a habeas corpus proceeding on the grounds that Tucker's attorney provided ineffective assistance of counsel.

The attorney failed to impeach the witness with medical records showing a different timeline of injury. The attorney failed to seek a continuance when he learned, contrary to his prior belief, that the victim would testify. And, the attorney failed to introduce evidence that the complainant's initial report to police did not implicate Tucker. Tucker presented the same evidence in his WICA case as he did in his habeas case. It was new evidence for purposes of WICA. But, according to the Court of Claims, it did not demonstrate Tucker's innocence; instead, it merely undermined the complainants' credibility. Again, the court held that the standard for post-conviction relief on an ineffectiveness claim was not as demanding as the standard to obtain WICA compensation.

Ledura Watkins, 2020 Mich. App. LEXIS 7046 (Mich. App. Oct. 22, 2020).

Watkins was convicted of murder based on the testimony of a witness who participated in the crime and hair evidence found at the crime scene, purported to be microscopically similar to Watkins'. The witness later recanted. Many years later, Watkins moved that his conviction be set aside based on new evidence of an expert who, based on an emerging understanding of the limitations of hair comparison evidence, stated the trial testimony about the asserted match was overstated. That motion was granted, and the prosecutor chose not to retry Watkins, citing insufficient evidence.

The Court of Claims (Murray, J) denied Watkins' WICA claim, holding that, while the trial testimony about the hair match was overstated, it did have some probative value, and as a result, Watkins did not demonstrate his innocence by clear and convincing evidence. The Michigan Court of Appeals parsed the language offered at trial and the new expert affidavit. It affirmed the denial of the claim, holding the Court of Claims did not err in holding the testimony regarding the hair retained some probative value even though the probability that the hair came from Watkins was uncertain. The dissenting judge said resolving these issues required an evidentiary hearing and the Court of Claims erred by deciding the case on summary disposition.

Will the proposed legislative amendment, changing the standard of proof from clear and convincing to a preponderance of evidence standard, help any of these eight claimants? It is difficult to answer that question. In theory, it makes good sense to align the burden of proof with that demanded of plaintiffs in the vast majority of civil cases (the preponderance standard). In practice, this change would only help WICA plaintiffs if they lost because they fell into the gap between preponderance and clear and convincing evidence – they could prove innocence by the former standard, but not the latter. No judge deciding cases under the existing statute had to make that determination.

What is clear is that an amended WICA would place the burden of proof on the plaintiff to demonstrate their innocence, not on the government to demonstrate their guilt. The proposal does not adopt a construction of WICA argued unsuccessfully by Chamar Avery. Placing the burden on the government to make a prima facie case of guilt would make it more likely that some of these plaintiffs could prevail. If the proposed bill is enacted, however, it would not be surprising if those eight exonerees would lose again were they to refile their claims. Cases built on establishing a viable affirmative defense (Gaines, Holbrook), or on undermining the credibility of prosecution witnesses (Dabb, Thompson, Tucker), and those leaving unrefuted some evidence of guilt (Dendel, Watkins) are challenging ones for plaintiffs.