

# WRONGFUL CONVICTION COMPENSATION



## A Call for Legislative Action and Reform

Suzanne Hopf - Kentucky Innocence Project

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## TIME LOST, LIFE LOST<sup>2</sup>

- Estimates - 1 - 5% of convictions are wrongful convictions
- Average time in prison = **9 years** (*National Registry of Exonerations*)
- Average time in prison DNA exonerations = **14 years** -(*Innocence Project*)
- Many individual clients spend **20 years of more** behind bars
  - Kentucky:
    - Jeff Clark - 22 years
    - Garr Hardin - 22 years
    - William Virgil - 28 years

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# KENTUCKY HAS NO COMPENSATION BILL

Vast majority of states assure exonerees receive compensation –38 states, D.C. and federal government

Kentucky has no law addressing compensation

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## EXONERATIONS

- Many years after crime – 20 or more years have elapsed
- Family support is diminished
- Time Lost
- Job skills
- Health issues
  
- Some exonerees are 40-50 years old trying to start a life

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MIKE VONALLMAN

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MIKE VONALLMAN



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## JOHNETTA CARR



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## FOUR KEY ELEMENTS FOR WRONGFUL CONVICTION COMPENSATION

- Provide ***at least \$50,000*** per year of wrongful incarceration.
- Reasonable standard of proof for eligibility.
- Straightforward process for ***courts to adjudicate claims.***
- ***Offset provision*** with federal civil awards/settlements.

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## PROVIDE ***AT LEAST \$50,000*** PER YEAR OF WRONGFUL INCARCERATION

Comports with the federal rate, and is followed  
by most states:

TX, CO, KS, OH, CA, CT, VT, AL, FL, HI, IN, MI, MN, MS, NJ, NV, NC, WA

TX \$ 80,000; CO \$ 70,000; KS \$ 65,000

10 states at \$50,000 – AL, FL, HI, IN, MN, MS, NJ, NC, WA

OR was most recent to pass at \$ 65,000

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## STANDARD OF PROOF FOR ELIGIBILITY

***Proponderance of evidence standard***  
to establish exoneree did not commit the crime

Many states that had no standard or clear and convincing  
standards have recently revised for a preponderance  
standard. IN, ID, KS, NV, OR, RI

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## ***ESTABLISHES COURTS SHALL ADJUDICATE CLAIMS***

Majority of states adjudicate claims in state courts  
21 states, 17 states have various mechanisms

A state claim board or commission may not have the  
experience to weigh evidence and assess claim, thus  
criminal courts are the best entity to make determinations

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## ***OFFSET PROVISION WITH FEDERAL CIVIL AWARDS/SETTLEMENTS***

To protect taxpayers some states have offset provisions  
reimbursing the state when a civil award or settlement occurs  
5 states – CO, KS, NJ, NV, OH

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## DEATH ROW AND/OR POST RELEASE SUPERVISION ADDITIONAL COMPENSATION

- Death Row Federal - additional \$ 100,000 per year death row
- CO - \$ 50,000 additional per year death row, \$ 25,000 per year parole, probation or sex offender registry
- MN - \$ 25,000 additional per year parole, probation or sex offender registry
- WA - \$ 50,000 additional per year death row, parole, probation, sex offender registry
- KS - \$ 25,000 additional per year parole, post-release supervision or sex offender registry

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## ADDITIONAL PROVISIONS TO PROVIDE ADEQUATE COMPENSATION AND GREATER REENTRY SUCCESS

- Medical expenses – 9 states
- Tuition assistance – 14 states
- General reentry expenses – 6 states
- Job search assistance – 7 states
- Counseling and mental health services – 12 states
- Housing assistance – 3 states
- Immediate assistance upon release and reentry - states

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## MODEL LEGISLATION<sup>15</sup>

SEE HANDOUTS

- Defines claimant (a)
- Establishes state court adjudicates claim (b)
- Standard of evidence and burden of proof(c)
- Time limit of two years (d)
- Amount of compensation (e)(1)
  - Imprisonment - \$ 65,000 year
  - Death row - \$ 75,000 year
  - Parole, post release supervision, sex offender registration - \$ 25,000 year
- No compensation if serving sentence on a different offense (e)(2)

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## MODEL LEGISLATION<sup>16</sup>

SEE HANDOUTS

- Attorney fees, capped at \$ 25,000 (e)(3)(A)
- Counseling, housing assistance, personal finance literacy (e)(3)(B)
- Tuition assistance (e)(3)(C)
- State health care benefits (e)(3)(D)
- Any restitution, court fees or assessments made by the courts (e)(3)(E)
- Adjustments for cost of living increases (e)(4)
- Non-taxable (e)(5)
- Civil award offset, funds awarded back to the state (f)
- Certificate of innocence finding (g)

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# Questions ?

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## Proposed Language for Wrongful Conviction State Compensation

### Section 1. Civil action for persons who were wrongfully convicted and imprisoned

(a) As used in this section, "claimant" means a person convicted and subsequently imprisoned for one or more crimes that such person did not commit.

(b) Notwithstanding the provisions of any other law, a claimant may bring an action in the circuit court seeking damages from the state pursuant to this section.

(c)(1) The claimant shall establish the following by a preponderance of evidence:

(A) The claimant was convicted of a felony crime and subsequently imprisoned;

(B) (1) the claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty; or (2) the claimant received a grant of gubernatorial pardon.

(C) the claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial; and

(D) the claimant did not commit or suborn perjury, fabricate evidence, or by the claimant's own conduct cause or bring about the conviction. Neither a confession nor admission later found to be false or a guilty plea shall constitute committing or suborning perjury, fabricating evidence or causing or bringing about the conviction under this subsection.

(2) The court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, may, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.

(d)(1) The suit, accompanied by a statement of the facts concerning the claim for damages, verified in the manner provided for the verification of complaints in the rules of civil procedure, shall be brought by the claimant within a period of two years after the:

(A) Dismissal of the criminal charges against the claimant or finding of not guilty on retrial; or

(B) grant of a pardon to the claimant.

(2) A claimant convicted, imprisoned and released from custody before [enactment date], must commence an action under this section no later than [2 years].

(3) All pleadings shall be captioned, "In the matter of the wrongful conviction of \_\_\_\_\_."

(4) Any claim filed pursuant to this section shall be served on the attorney general in accordance with the code of civil procedure.

(5) The suit for a claim filed pursuant to this section shall be tried by the circuit court.

(e)(1) Damages awarded under this section shall be:

(A) (i) \$65,000 for each year of imprisonment, except as provided in subsection(e)(2); or

(ii) \$75,000 for each year of imprisonment if the claimant was imprisoned on death row, except as provided in subsection(e)(2); and

(B) \$25,000 for each additional year served on parole or postrelease supervision or each additional year the claimant was required to register as an offender under the Kentucky offender registration act, whichever is greater.

(2) A claimant shall not receive compensation for any period of incarceration during which the claimant was concurrently serving a sentence for a conviction of another crime for which such claimant was lawfully incarcerated.

(3) In addition to the damages awarded pursuant to subsection (e)(1), the claimant:

(A) Shall be entitled to receive reasonable attorney fees and costs incurred in the action brought pursuant to this section not to exceed a total of \$25,000, unless a greater reasonable total is authorized by the court upon a finding of good cause shown;

(B) may also be awarded other non-monetary relief as sought in the complaint including, but not limited to, counseling, housing assistance and personal financial literacy assistance, as appropriate;

(C) shall be entitled to receive tuition assistance pursuant to [cite], and amendments thereto; and

(D) shall be entitled to participate in the state health care benefits program pursuant to [cite], and amendments thereto

(E) shall be entitled to reimbursement for all restitution, assessments, fees, court costs, and all other sums paid by the claimant as required by pretrial orders and the judgment and sentence in in any proceeding that gave rise to the conviction, reversal, or vacation of the conviction, or from retrial following reversal.

(4) Beginning in 2022, and every year thereafter, the State Court Administrator shall determine the percentage increase or decrease in the cost of living for the previous calendar year, based on changes in the [CPI] as published by the Bureau of Labor Statistics of the United States Department of Labor. On or before July 1 of the year in which the State Court Administrator makes the determination required by this subsection, the State Court

Administrator shall adjust the amounts prescribed under subsection (4) of this section for the following calendar year by multiplying the amounts applicable to the calendar year in which the adjustment is made by the percentage amount determined under this subsection. The adjustment may not exceed three percent for any year. The State Court Administrator shall round the adjusted limitation amount to the nearest \$100, but the unrounded amount shall be used to calculate the adjustments to the amounts in subsequent calendar years. The adjusted amounts become effective on July 1 of the year in which the adjustment is made, and apply to all claims filed under this section on or after July 1 of that year and before July 1 of the subsequent year.

(5) Compensation awarded as a result of a claim for compensation for wrongful conviction under this section is excluded from gross income and not subject to taxation.

(f)(1) If, at the time of the judgment entry referred to in subsection (e), the claimant has won a monetary award against the state or any political subdivision thereof in a civil action related to the same subject, or has entered into a settlement agreement with the state or any political subdivision thereof related to the same subject, the amount of the award in the action or the amount received in the settlement agreement, less any sums paid to attorneys or for costs in litigating the other civil action or obtaining the settlement agreement, shall be deducted from the sum of money to which the claimant is entitled under this section. The court shall include in the judgment entry an award to the state of any amount deducted pursuant to this subsection.

(2) If subsection (f)(1) does not apply and if, after the time of the judgment entry referred to in subsection (e), the claimant wins a monetary award against the state or any political subdivision thereof in a civil action related to the same subject, or enters into a settlement agreement with the state or any political subdivision thereof related to the same subject, the claimant shall reimburse the state for the sum of money paid under the judgment entry referred to in subsection (e), less any sums paid to attorneys or for costs in litigating the other civil action or obtaining the settlement agreement. A reimbursement required under this subsection shall not exceed the amount of the monetary award the claimant wins for damages in the other civil action or the amount received in the settlement agreement.

(g) If the court finds that the claimant is entitled to a judgment, it shall enter a certificate of innocence finding that the claimant was innocent of all crimes for which the claimant was mistakenly convicted. The clerk of the court shall send a certified copy of the certificate of innocence and the judgment entry to the attorney general for payment pursuant to [cite], and amendments thereto.

(h)(1) Upon entry of a certificate of innocence, the court shall order the associated convictions and arrest records sealed and purged from all applicable state and federal systems pursuant to this subsection. The court shall enter the sealing order regardless of whether the claimant has prior criminal convictions.

(i) Upon entry of a certificate of innocence, the court shall order the expungement and destruction of the associated biological samples authorized by and given to the Kentucky state police in accordance with [cite], and amendments thereto. The order shall state the information required to be stated in a petition to expunge and destroy the samples and profile record pursuant

to [cite], and amendments thereto, and shall direct the Kentucky state police to expunge and destroy such samples and profile record. The clerk of the court shall send a certified copy of the order to the Kentucky state police, which shall carry out the order and provide confirmation of such action to the court. Nothing in this subsection shall require the Kentucky bureau of investigation to expunge and destroy any samples or profile record associated with the claimant that was submitted pursuant to [cite], and amendments thereto, related to any offense other than the offense for which the court has entered a certificate of innocence.

(j) The decision to grant or deny a certificate of innocence shall not have a res judicata effect on any other proceedings.

(k) Nothing in this section shall preclude the department of corrections from providing reentry services to a claimant that are provided to other persons, including, but not limited to, financial assistance, housing assistance, mentoring and counseling. Such services shall be provided while an action under this section is pending and after any judgment is entered, as appropriate for such claimant.

(l) The decision of the circuit court may be appealed directly to the supreme court pursuant to the code of civil procedure.

# INNOCENCE PROJECT

## Key Provisions in Wrongful Conviction Compensation Laws

1. **Provide at least \$50,000 per year of wrongful incarceration.** Federal compensation law provides \$50,000 per year of wrongful incarceration. The majority of the 35 states with wrongful conviction compensation laws provide \$50,000 or more (TX, CO, KS, OH, CA, CT, VT, AL, FL, HI, IN, MI, MN, MS, NJ, NV, NC, WA).
2. **Reasonable standard of proof for eligibility.** Claimant should have to establish by preponderance of evidence that he or she did not commit the crime or related acts. "The claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial."
3. **Straightforward process through courts to adjudicate claims:** Nationally, 22 of the 35 states with compensation laws adjudicate claims through courts: the state high court, circuit courts, district courts, trial courts or state civil court. While some states designate state claims boards or commissioners, or other state commissions to adjudicate claims these entities do not have the same experience in weighing evidence and assess claims as the courts. The courts are the appropriate entities to handle these claims.
4. **Offset provision with federal civil awards/settlements:** To protect taxpayers, several states require exonerees who receive state compensation and later win federal civil rights lawsuits/settlements, to reimburse the state. Conversely, exonerees who first win federal civil rights lawsuits and then file for state compensation would only be entitled to an amount of state compensation that is subtracted from the civil awards.

### National Landscape

#### **35 states + Federal government + Washington, DC have laws to compensate the wrongfully convicted**

AL, CA, CO, CT, FL, HI, IA, IL, IN, KS, LA, MA, MD, ME, MI, MN, MO, MS, MT, NC, NE, NH, NJ, NV, NY, OH, OK, TN, TX, UT, VA, VT, WA, WI, WV.

- I. **Monetary Compensation:** *Federal government, Washington, DC + 18 states provide at least \$50,000 per year of wrongful incarceration.*

#### **More than \$50,000= 9 States**

- Washington, DC- \$200,000
- NV- 1-10 years= \$50,000 per year of wrongful incarceration; 10-20 years= \$75,000 per year of wrongful incarceration; 20 or more years = \$100,000 per year of wrongful conviction
- TX- \$80,000
- CO- \$70,000
- KS-\$65,000
- OH- \$52,625.18
- CA- \$51,110
- CT- \$49,314-\$131,506
- VT- \$30,000-\$60,000

**\$50,000= 10 States** AL, FL, HI, IN, MI, MN, MS, NJ, NC, WA

# INNOCENCE PROJECT

## II. Additional Compensation for Years on Death Row and/or Post-Release Supervision:

*4 states + Federal Government*

- **Federal:** Additional \$100,000 per year on death row.
- **CO:** \$50,000 additional compensation per year on death row; \$25,000 per year on parole, probation or sex offender registry.
- **MN:** \$25,000 per year on parole, probation or sex offender registry.
- **WA:** \$50,000 additional per year on death row, \$25,000 per year on parole, probation, sex offender registry.
- **KS:** \$25,000 per year for each additional year served on parole, post-release supervision or on sex offender registry.

## III. Non-Monetary Services *19 states.*

- **Tuition assistance:** 14 states (CO, CT, FL, KS, LA, MA, MN, MT, NC, NJ, NV, TX, VA, VT)
- **Medical expenses:** 9 states (CA, IL, KS, LA, MN, NJ, NV, TX, VT)
- **Job search assistance:** 7 states (CA, CT, LA, IL, NC, NJ, TX)
- **Housing assistance:** 3 states (CA, KS, NJ)
- **Counseling services:** 12 states: (CA, CT, IN, KS, LA, MA, NJ, NV, TX, VA, VT, WA)
- **Re-entry services:** 6 states: (CA, CT, IL, IN, NV, TX)
- **Immediate assistance upon exoneration:** 1 state (CA)

## IV. Who decides? *21 states have courts adjudicate claims*

- **Board of Claims:** 3 states (TN, NH, WI)
- **Board of Public Works:** 1 state (MD)
- **Victim Compensation Board and Board of Claims:** 1 state (CA)
- **Claims Commissioner:** 1 state (CT)
- **Comptroller's Judiciary Section:** 1 state (TX)
- **General Assembly:** 1 state (VA)
- **Industrial Commission:** 1 state (NC)
- **State Division of Risk Management and Committee on Compensation for Wrongful Incarceration:** 1 state (AL)
- **Criminal Justice Institute:** 1 state (IN)
- **Not specified:** 2 states (MT, NE)
- **Courts:** 21 states
  - **Circuit Court:** 2 states (HI, MS)
  - **Superior Court or County Supreme Court:** 5 states (MA, ME, NJ, VT, WA)
  - **Court of Claims:** 5 states (IL, MI, NY, WV, OH)
  - **District Court:** 5 states (CO, KS, NV, UT, IA)
  - **Sentencing court:** 1 state (MO)
  - **State civil court:** 1 state (OK)
  - **Trial court:** 2 states (FL, LA)
  - **U.S. Court of Federal Claims:** Federal

## V. Civil Offset Provisions: *5 States (CO, KS, NJ, NV, OH)*

Five states have an offset provision for civil awards/settlements. The state is reimbursed if the exoneree first receives state compensation under the law, and then wins a civil lawsuit against the local government actors that is greater than the amount of state compensation. If exoneree first received a civil award/settlement stemming from the wrongful conviction, that amount would be deducted from any state compensation owed.