

# STATE OF WISCONSIN

# Senate Journal

## One-Hundred and First Regular Session

MONDAY, April 14, 2014

The Chief Clerk makes the following entries under the above date.

### PETITIONS AND COMMUNICATIONS

#### State of Wisconsin Claims Board

April 7, 2014

Enclosed is the report of the State Claims Board covering the claims heard on March 19, 2014. Those claims approved for payment pursuant to the provisions of s.16.007 and 775.05 Stats., have been paid directly by the Board.

This report is for the information of the Legislature. The Board would appreciate your acceptance and publication of it in the Journal to inform the members of the Legislature.

Sincerely,  
*GREGORY D. MURRAY*  
Secretary

#### STATE OF WISCONSIN CLAIMS BOARD

**The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on March 19, 2014, upon the following claims:**

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. Robin N. Gavinski	Corrections	\$67,465.04
2. Joseph Frey	Innocent Convict Compensation	\$25,000.00

**The following claims were decided without hearings:**

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
3. Michael D. Kelly	Wisconsin Court System	\$5,356.00
4. Ceso Sprewell	Corrections	\$967.24
5. Thomas C. Smith	Corrections	\$300.39

#### ***The Board Finds:***

**1. Robin Gavinski** of Lake Mills, Wisconsin claims \$67,465.04 for lost wages and attorney's fees related to the miscalculation of his mandatory release date by DOC employees. The claimant was convicted and sentenced in

three Dane County cases. He does not dispute the convictions and takes responsibility for his actions. However, two DOC employees erred when calculating the claimant's sentence: a records assistant, who incorrectly calculated one of the claimant's sentences as consecutive instead of concurrent, and the records administrator, who failed to catch the error when she checked the first employee's work. The claimant states that DOC's sentencing calculations are done by hand, on paper, which is woefully outdated. The claimant notes that DOC admits to the errors by its employees. If the claimant's sentence had been correctly calculated, he would have been released on 6/18/11 but because of the error he was held until 8/7/12, 417 days longer than he should have been. DOC's error was discovered when the claimant petitioned for early release. As part of that petition, DOC was required to certify the claimant's release date and discovered their error. DOC released the claimant the following day. In March 2013 the claimant filed a lawsuit against DOC but the names of the DOC employees who erred in calculating his sentence were not known, thereby precluding any liability against them. The claimant states that he voluntarily dismissed his suit on the advice of his attorney and has no other legal action pending in this matter. The claimant disputes DOC's argument that they are protected against tort suits by the doctrine of sovereign immunity because this is not a tort lawsuit. The claimant points to the fact that the Claims Board has a history of issuing awards for tort claims. The claimant also notes that § 775.01, Stats., referenced by DOC, does not apply to tort claims and that a Claims Board decision in this case will not waive the state's sovereign immunity. The claimant also believes it is unreasonable for DOC to argue that the claimant and his trial attorney bear some responsibility for failing to find and correct DOC's error. The claimant is a high school dropout and, unlike DOC's employees, he has no training or experience in calculating release dates. The claimant also states that he had three successive trial attorneys in the case where the error occurred, the third of which died in 2008. The claimant points to an affidavit from Eric Schulenburg, a criminal defense attorney with 45 years of experience, who states that DOC sentencing calculations are typically not provided to trial attorneys and that the claimant's trial attorney had no responsibility to double-check DOC's calculations. The claimant works full time and earns additional wages by running his own handyman business. He requests reimbursement for lost wages and attorney's fees based on equitable principles. The claimant proposes an alternate damage calculation method, drawing a parallel

between his claim of being held in prison too long and payments made to innocent convicts under § 775.05, Stats. Based on this theory, he proposes an alternate damage amount of \$7,600.00

DOC recommends denial of this claim. DOC does not deny that an unintentional error occurred in calculating the claimant's sentence; however, DOC believes this claim is an action in tort and that the state and its agencies are therefore protected from any legal liability by the doctrine of sovereign immunity. DOC believes that a Claims Board award to this claimant would unilaterally and improperly abrogate the state's constitutional immunity from tort claims. DOC states that although a Claims Board claim may not technically be a tort lawsuit, the Claims Board process is the prerequisite for suing the state in any capacity (775.01, Stats.). DOC believes the authority given to the Claims Board under § 16.007, Stats., is ambiguous. DOC further believes that § 16.007, Stats., does not constitute express consent by the legislature to be sued in tort. DOC also notes that while the legislature expressly authorized a process to compensate innocent people wrongly convicted of crimes (775.05, Stats.), it has provided no process to compensate non-innocents such as the claimant. DOC also believes that the claimant and his trial counsel share significant responsibility for the claimant's excess incarceration because they both failed to correct the mistake made in sentence calculation. DOC states that irrespective of the fact that they are relatively uneducated, most prison inmates are keenly aware of their sentence structures. DOC notes that neither the claimant nor his trial attorney ever contacted DOC to question the accuracy of the sentence calculation. DOC states that these types of errors are very rare. Finally, DOC believes that even if some award were justified, the claimant's claim for lost wages is speculative at best because there is no proof that the claimant would have been employed at all, much less making the wages claimed during the time period at issue in this claim.

The Board concludes the claim should be paid in the reduced amount of \$7,600.00 based on equitable principles. The Board further concludes, under authority of 16.007(6m), Stats., payment should be made from the Department of Corrections appropriation §20.410(1)(a), Stats.

In addition, the Board further encourages the DOC to take steps to correct sentencing miscalculations of this nature.

Finally, the Board believes it is important to clarify that the doctrine of sovereign immunity does not control this case and that payment of this claim does not constitute a waiver of the State's sovereign immunity. The Board disagrees with DOC's legal analysis on this point and would underscore that the language in § 16.007(5), Stats., which states: "if from its findings of fact the board concludes that any such claim is one on which the state is legally liable, or one which involves the casual negligence of any officer, agent or employee of the state, or one which on equitable principles the state should in good conscience assume and pay. ..." authorizes payment for claims of this nature.

**2. Joseph Frey** of Madison, Wisconsin claims \$25,000.00 for Innocent Convict Compensation pursuant to

Wis. Stats. § 775.05. The claimant states that he spent nearly 8 years in prison for a crime he did not commit. On 2/9/91, a UW-Oshkosh student was sexually assaulted in her apartment by a knife-wielding assailant. The victim called the police after the assault. The police collected several types of physical evidence, including the results of a "rape-kit exam, pubic hairs, the victim's clothing, and her bed sheets (which contained a semen stain). However, with the exception of the victim's bed sheets, all of the physical evidence was inappropriately destroyed by the police before the trial. The claimant became a suspect in the assault based on a top from the Green Bay Police Department. The claimant was placed in a live lineup and although the victim stated that he looked similar to her assailant, she did not positively identify the claimant. In fact, the victim initially identified her landlord as her assailant and later implicated a third suspect. Over the course of four lineups, she continued to compare and contrast the individuals presented to her. The claimant notes that Wisconsin has since enacted procedures to prevent these kinds of suggestive lineups. At the claimant's trial, the jury was presented with the victim's "identification" of the claimant and testimony from a jailhouse snitch. The claimant alleges that the prosecuting attorney in his case was later found to have a history of eliciting false testimony from jailhouse informants. DNA testing of the victim's sheets, which excluded the claimant as the source of semen stain, was also presented to the jury. The State argued that the stain was caused by consensual sexual activity that occurred prior to the assault. The jury convicted the claimant and he was sentenced to 102 years in prison. In October 2012, the claimant was granted post-conviction DNA testing on the bed sheets in an attempt to identify the source of the semen stain by running the DNA results through CODIS. The DNA test results matched a convicted sex offender in CODIS, James Crawford. The claimant states that additional investigation revealed that neither the claimant nor her roommate knew Crawford and that there was no innocent explanation which accounted for Crawford's semen on the victim's sheets. In addition, the claimant notes that Crawford was later convicted of raping two young girls. Crawford's mother also stated that towards the end of his life, Crawford wrote a letter to a judge confessing another rape but that letter was not sent before Crawford died. Although Crawford did not reveal the details of this prior rape to his mother, Crawford matched the description of the victim's assailant and Crawford's brother confirmed that Crawford used to hang around the UW-Oshkosh campus peeking into young women's windows. In May 2013, Winnebago ADA Adam Levin and the claimant's counsel jointly recommended that the court vacate the claimant's conviction. The claimant was released and the Winnebago County DA's Office dismissed the charges against him in July 2013. The claimant states that given James Crawford's criminal history, his subsequent sexual assaults, and the statements by his mother and brother, the presence of Crawford's DNA on the victim's sheets is clear and convincing evidence of the claimant's innocence. The claimant states that he did not, by action or inaction, contribute to his own conviction. The claimant notes that he has no intention of pursuing a claim for

damages in federal court, because a federal claim would require that he prove some sort of malicious intent, which is not what he is alleging happened in his case. He requests the statutory maximum of \$25,000 reimbursement for the 8 years he spent in prison.

The Winnebago County District Attorney's Office (DA) states that although they are certain that the claimant is not guilty of the crime for which he was convicted, they cannot comfortably state that he is innocent. The DA believes that the DNA deposited on the victim's sheets could have survived washing and that nothing about the deposit establishes the time it was created. The DA states that there are a number of possible scenarios which could account for Crawford's DNA on the victim's sheets: Crawford could have had sex with one of the other residents on the victim's house, he could have entered the house and masturbated on the victim's bed, or he could have sex with another individual on the claimant's bed during a house party. The DA notes that the nature of this assault was similar to other rapes to which the claimant admits. The DA also notes that while jailhouse informations can be unreliable, they are often truthful. Finally, the DA states that although there are reliability issues related to eyewitness stranger identification, such identifications are certainly not always incorrect.

Based on the testimony at hearing and the written submissions by the petitioner and the district attorney, including the DNA evidence implicating that James Crawford, another known sex offender, committed the crime, the Board finds that the evidence is clear and convincing that the petitioner was innocent of the crime for which he suffered imprisonment. The Board also finds, based on the court record and other evidence presented at the hearing, that the petitioner did not by his act or failure to act, bring about his conviction. As a result of the foregoing findings, the Board concludes that, based on equitable principals, the petitioner should be awarded a total of \$25,000 for the 8 years he spent in prison. The Board further concludes, under authority of § 16.007 (6m), Stats., payment should be made from the Claims Board appropriation § 20.505(4)(d), Stats.

**3. Michael D. Kelly** of Wellton, Arizona claims \$5,356.00 for lost wages due to an allegedly excessive prison sentence imposed by the Wisconsin courts. On 11/12/02, the claimant was charged with violating Wis. Stat. § 961.41(1m)(h)1. The claimant states that he possessed 161 grams of THC at the time of his arrest on 1/11/02. The claimant alleges that § 961.41(1m)(h)1, provides that if a person is in possession of "[t]wo hundred grams or less, or 4 or fewer plants containing tetrahydrocannabinols, the person is guilty of a Class I felony." The claimant states that a Class I felony has a maximum prison sentence of one year and six months but that he was incorrectly sentenced to two years in prison. The claimant disputes the Court's argument that 2001 Wisconsin Act 109 changed § 961.41(1m)(h)1. The claimant alleges that this section of the statute was not changed by the 2001 WI Act 109 and that the statute assigning a Class I felony for possession of less than 200 grams of THC was in effect at the time of his arrest. The claimant points to his Judgment of Conviction, which clearly states that he was charged with violating §

961.41(1m)(h)1, but incorrectly describes the violation as possession of "<=500 grams" instead of less than 200 grams and also incorrectly describes the violation's severity as an Class U (unclassified) felony instead of a Class I felony. The claimant believes his attorney should have appealed the sentence. He registered a complaint against the attorney with the Office of Lawyer Regulation but was unsuccessful. He also filed a motion with Pierce County Circuit Court to correct the excessive sentence but was unsuccessful. The claimant alleges that his appointed attorney, the prosecutor, the judge and the court system all allowed his illegally excessive sentence to stand. He claims lost wages for the 6 months he was allegedly illegally imprisoned. He is unable to access paystubs or tax documents for the six months in question. He therefore requests reimbursement in the amount of \$5.15 per hour (the 2004 Federal Minimum Wage) for 26 weeks.

The Court System recommends denial of this claim. The Courts state that the facts related to this claim are beyond dispute. The Courts state that the claimant was sentenced with violating § 961.41(1m)(h)1 (2001-2002), possession with intent to deliver 500 or less grams of THC. The Courts state that under the sentence structure in effect at the time, the maximum prison sentence was three years and four months; the claimant was sentenced to two years in prison. The Courts state that 2001 Wisconsin Act 109 amended § 961.41(1m)(h)1 to apply to possession with intent to deliver 200 grams or less of THC and provided for a maximum prison sentence of one year and six months. However, the Courts note that 2001 WI Act 109 first applied the statutory changes to offenses committed on the effective date of the Act, 2/1/03. The Courts state that because the claimant's offense took place prior to 2/1/03, these statutory changes allowing for a charge in possession of 200 grams or less did not apply to the claimant. Although the publication date of 2001 WI Act 109 predated the claimant's offense-which perhaps accounts for some confusion on the claimant's part-the page of the statutes he submitted as evidence (Claimant's Exhibit 2, 01-02 Wis. Stats page 5868) clearly states in the "NOTE" under § 961.41(1m)(h)5 that the effective date of the statute shown is 2/1/03. The Courts state that the claimant has provided no evidence in support of his allegations and believes the claim should be denied.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable now one with the state should assume and pay based on equitable principles.

**4. Ceso Sprewell** of Boscobel, Wisconsin claims \$967.24 for return of court fines allegedly deducted improperly from the his inmate account by DOC. The claimant states that the Judgment of Conviction (JOC) associated with case no. 00CF157 indicates that the fines (totaling \$1,065.50) were only to be deducted from his prison wages but that DOC deducted a total of \$964.24 from money that was "gifted" to him by his family. The claimant attempted to resolve the issue with DOC through the Inmate Complaint process but was told the money had been forwarded to the court system and that he needed to petition the court for reimbursement. When he did so, the court told

the claimant that he needed to file a claim against DOC to get the money returned. The claimant rejects as irrelevant DOC's argument that the transcript is controlling rather than the JOC because, the claimant alleges, the court did not have authority to order deductions from his prison wages or any other monies at the time of his sentencing. The claimant alleges that the court did not properly follow the procedures set forth in Wis. Stat. § 973.05, which, the claimant states, does not allow the court to prematurely enter a lien or to enter a lien against gifted monies. The claimant alleges that the court was not able to enter a lien against "other monies" until he was discharged from his sentence on 7/3/04 and that the court had to follow certain procedures in order to do so at that time. The claimant also rejects DOC's sovereign immunity argument, stating that the legislature expressly granted consent to sue DOC in Wis. Stats. § 301.04. The claimant also states that he was discharged from case no. 00CF157 on 7/3/04 but that DOC continued to illegally deduct fines related to that case without authority. Finally, the claimant states that the clerk of courts notified him that they received the last fine payment related to case no. 00CF157 from DOC on 8/21/12 and that the fine had been paid in full, however, DOC's inmate Trust Account Statement for the claimant dated 12/20/13 still showed a balance of \$98.26 in fines related to case no. 00CF157. The claimant requests reimbursement of the money he believes DOC deducted from his account without proper authority.

DOC recommends denial of this claim. DOC points to the fact, that as is noted in Exhibit 4 of the claimant's own claim, at footnote two, "[a]lthough the written judgment of conviction states that the court ordered the fine and cost to be paid from 25% of prison wages, the sentencing transcript shows that the court ordered deductions from any monies the defendant received. The transcript is controlling." DOC states that it correctly followed the court's directive to make deductions from all inmate monies, including wages, gifts and so forth. DOC believes the claimant's claim is meritless and that the department simply made certain the claimant paid what he owed. DOC also believes that the state is entitled to sovereign immunity and therefore has no legal or equitable obligation to pay the claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one with the state should assume and pay based on equitable principles.

**5. Thomas C. Smith** of Portage, Wisconsin claims \$300.39 for the value of a television allegedly destroyed improperly by DOC staff and reimbursement of a \$5 disposal fee allegedly taken from his inmate account without his authorization. The claimant is an inmate at Columbia Correctional Institution (CCI). The claimant received a new TV on 5/30/13. He asked CCI property staff to mail his old TV to a friend outside the institution to a friend. The claimant alleges that he was never told that his old TV had been returned to CCI until Sgt. Donovan mentioned it on 7/25/13 when the claimant asked about other property. The claimant states that he told Sgt. Donovan at that time that he would provide another address to which property staff could mail the old TV. The claimant

states that the next day he received a disbursement receipt showing that \$5 had been removed from his account for the disposal/destruction fee for his old TV. The claimant alleges that Sgt. Donovan forged the claimant's signature on the disbursement form. The claimant attempted to pursue this matter through the Inmate Complaint system but his complaint and appeal were dismissed. The claimant takes issue with DOC's allegation that he is not a creditable individual. The claimant admits that he has a criminal history but states that he has no reason to lie and has presented this claim truthfully. The claimant also states that DOC has provided no paperwork to prove that he was notified of the destruction of his television and the deduction of the disposal fee from his account. The claimant requests reimbursement for the cost of his old TV and the TV disposal fee. The claimant is willing to accept payment of a depreciated amount for the TV if that is what the Claims Board feels is appropriate.

DOC recommends denial of this claim. DOC states that Sgt. Donovan told the claimant twice in person and at least twice through messages left with unit staff that his old TV had been returned to CCI marked "Refused" and that the claimant needed to provide a new address to which to send the old TV. DOC states that the claimant failed to do so and therefore, pursuant to DAI Policy 309.20.03, the TV was destroyed 30 days after the claimant's failure to provide a new address. DOC notes that Sgt. Donovan did not "forge" the claimant's signature on the disbursement form for the TV disposal fee, but instead simply wrote "Refused" which indicated that the claimant refused to sign the form. DOC notes that, unlike the claimant, Sgt. Donovan has nothing to gain by lying about the circumstances surrounding this claim. DOC states that in a contest of credibility between Sgt. Donovan and the claimant, the claimant's extensive criminal history and rule violations while incarcerated demonstrate that he is not a credible, trustworthy individual. Finally, DOC believes that the doctrine of sovereign immunity protects the state from any legal liability related to this claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one with the state should assume and pay based on equitable principles.

***The Board concludes:***

**That the following identified claimants are denied:**

- Michael D. Kelly
- Ceso Sprewell
- Thomas C. Smith

**That payment of the amounts below to the identified claimants from the following statutory appropriations is justified under § 16.007, Stats:**

Robin N. Gavinski	\$7,600.00	§ 20.410(1)(a), Stats.
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**That payment of the amounts below to the identified claimants from the following statutory appropriations is justified under § 775.05, Stats:**

Joseph Frey      \$25,000.000      § 20.505(4)(d), Stats.

**Dated at Madison, Wisconsin this 4<sup>th</sup> day of April, 2014.**

*COREY FINKELMEYER*

Chair, Representative of the Attorney General

*GREGORY D. MURRAY*

Secretary, Representative of the Secretary of Administration

*BRIAN HAGEDORN*

Representative of the Governor

*JOSEPH LEIBHAM*

Senate Finance Committee

*PATRICIA STRACHOTA*

Assembly Finance Committee

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**REFERRALS AND RECEIPT OF  
COMMITTEE REPORTS CONCERNING  
PROPOSED ADMINISTRATIVE RULES**

**Senate Clearinghouse Rule 10–111**

Relating to military family financial aid.

Resubmitted by Department of Military Affairs with germane modifications attached, pursuant to s. 227.19 (4)(b)4, Wisconsin Statutes, April 3, 2014.

Referred to committee on **Transportation, Public Safety, and Veterans and Military Affairs**, April 14, 2014.