

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on December 13, 2006, upon the following claims:

	<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1.	Anthony T. Hicks	Innocent Convict (§ 775.05, Wis. Stats.)	\$131,061.71
2.	Paul W. Barrows	University of Wisconsin	\$124,521.48+

The following claims were considered and decided without hearings:

	<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
3.	Tracy L. Delrow	Oconto County District Attorney's Office	\$790.50
4.	Ronald A. Keith, Sr.	Department of Health & Family Services	\$2,900.00
5.	Milwaukee Wave, LLC	Department of Revenue	\$12,000.00
6.	Laura A. Outland-Symicek	Department of Revenue	\$2,635.20
7.	Gordon Ray	Department of Administration	\$50.00
8.	Daniel F. Salopek	Department of Commerce	\$3,006.10

The Board Finds:

1. **Anthony T. Hicks** of Houston, Texas claims \$131,061.71 for compensation of an innocent convict pursuant to §775.05, Wis. Stats. In December 1991, the claimant was wrongfully convicted of robbery, burglary and sexual assault and sentenced to 19 years in prison. He served 4.5 years before he was exonerated by DNA evidence. In November 1990 the victim was sexually assaulted and robbed in her apartment after allowing a black male to come in to use her telephone. The claimant lived in the same apartment complex as the victim and when he was arrested for an unrelated offense, a clerical employee at the police station believed he resembled the composite sketch of the attacker. The victim picked him out of a lineup, even though the claimant lacked a cleft chin, the one defining facial feature of her attacker which she recalled.

At trial, the state provided testimony that a microscopic examination of hairs found on the scene showed that they were "consistent" with samples provided by the claimant. This sort of microscopic hair comparison has since been resoundingly discredited. The claimant's trial counsel failed to inform him of the possibility of DNA testing, which was relatively new at the time, and failed to order such testing. The trial counsel also failed to secure the testimony of an alibi witness, a co-worker of the claimant, who would have testified that he was on the phone with the claimant at about the same time the assault was taking place and that the claimant was perfectly calm and collected. The claimant retained Steve Hurley to pursue post-conviction relief. Mr. Hurley obtained DNA testing of the hair evidence and the results excluded the claimant as the source of that hair. Mr. Hurley moved for a new trial, which was ultimately granted by the Wisconsin Supreme Court. The claimant was released on bail and Mr. Hurley pursued additional DNA testing on hair samples from the crime scene. This additional round of testing even more conclusively excluded the claimant as the source of the hairs. Exclusion of this evidence left only the eyewitness testimony of the victim. Eyewitness testimony, especially that involving cross-racial identification has been shown to be unreliable. Faced with the new DNA evidence and given the unreliability of the victim's identification of the claimant, the state chose not to retry the claimant and all charges against him were dismissed.

The claimant has suffered significant financial losses due to his wrongful imprisonment. Although the claimant did pursue legal action against his trial attorney, who was found to be negligent, the eventual settlement that proceeded from that action was based upon the attorney's very limited ability to pay. The claimant requests compensation in the full statutorily allowed amount of \$25,000. The claimant also requests reimbursement for the significant legal fees he has incurred to prove his innocence in the amount of \$106,061.71.

The Dane County District Attorney's Office does not dispute the facts of this claim as presented by the claimant. Since the claimant's conviction microscopic hair analysis has been wholly discredited and the strength of eyewitness testimony has been generally undermined.

In addition, there is the compelling DNA evidence excluding the claimant as the source of the hairs found at the scene. The State concludes that, were they presented with all the facts of this case today, the claimant never would have been charged. The State therefore does not hesitate to recommend approval of this claim.

The Board concludes the claim should be paid in the amount of \$25,000, plus attorney's fees in the reduced amount of \$53,060.86, for a total award of \$78,030.86. The Board further concludes, under authority of § 16.007 (6m), Stats., that payment should be made from the Claims Board appropriation § 20.505 (4)(d), Stats.

2. Paul W. Barrows of Madison, Wisconsin claims \$124,521.48+ for value of sick time and leave time, as well as lost pay. The claimant has been employed by the UW since 1989 and was appointed as Vice Chancellor of Student Affairs in 2000. The claimant states that in November 2004, the Chancellor unexpectedly informed him that that he had to step down as Vice Chancellor and should start looking for another job. The claimant states that the Chancellor placed him on indefinite leave without pay and told him that he could use sick, vacation and annual leave account time in order to have an income while he was on leave. The claimant states that he was forced to use 524 hours of sick leave, which had a value of \$96,237.84. The claimant states that he was also forced to use 186 hours of vacation and 124 hours from his Annual Leave Reserve Account. The claimant places the value of this used leave time at \$28,283.64. The claimant asserts that he was forced to stay on leave by the Chancellor despite his requests to be allowed to return to work. The claimant states that he did look for other employment during this time and that he received an offer from Hunter College in NY. The claimant states that he asked the Chancellor if he would be willing to make an offer to match the Hunter College position and that the Chancellor offered him a consultant position with a \$150,000 salary. The claimant states that he declined the Hunter College job in reliance of this offer. In June 2005, the claimant received a letter from the Chancellor indicating that the claimant would not be allowed to begin the consultant position because of sexual harassment allegations, which were later proven false. Instead of being given the promised consultant position, the claimant was placed in a position with a salary of \$72,881, resulting in a \$211.28 per day loss of income, for which the claimant also requests reimbursement.

The University of Wisconsin recommends denial of this claim. In late 2003, the claimant commenced a sexual relationship with a graduate student. Believing this showed very poor judgment, the Chancellor asked the claimant to step down as Vice Chancellor in early November 2004. The claimant used sick and vacation leave to continue to receive wages at the Vice Chancellor rate until June 2005, when he was placed into an academic staff back up position with a pay rate of \$72,881. The claimant cites no law or theory as to why he should be reimbursed for his leave time. This matter has been the subject of legal action in which the claimant has not prevailed. After media revelations about the claimant's sick leave use, the claimant met with the Chancellor and denied any inappropriate behavior towards female students or subordinates, assuring the Chancellor that there were no other women who could make complaints about him. Several days later the Chancellor learned of an additional inappropriate relationship with a female student, which the claimant did not deny. He concluded that the claimant had lied and rescinded his offer of the consultant position. The UW points to the fact that this was always an "at will" position, which could be terminated at any time without cause and that the claimant therefore has no right to the position. The UW also points to the fact that at the time they first discussed the Hunter College offer, the claimant indicated that he had no intention of taking the Hunter College job, because he did not want to move to NY and because he was expecting a better offer from the University of Texas, which never materialized.

At the hearing on the claim, the claimant asserted that he was entitled to compensation based upon the doctrine of promissory estoppel in that the claimant had declined the job offer at Hunter College based upon the offer of a \$150,000 a year consultant position with the UW, which he was never given. The UW asserted that the doctrine of promissory estoppel does not apply and that the position offer was an "at will" position.

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 which the state should assume and pay based on equitable principles.
[Member Hunter not participating.]

3. Tracy L. Delrow of New London, Wisconsin claims \$790.50 for unpaid wages allegedly lost due to the failure of the Oconto County District Attorney to pursue wage claim in a timely fashion. In March 2004 the claimant filed a claim with the Department of Workforce Development for unpaid wages from January 2004. DWD forwarded the claim to the Oconto County District Attorney's Office with the request that he proceed against the company in question pursuant to § 109.09, Stats. The claimant states that he spoke to someone in the DA's office in April 2004 and was told that it would take a year because wage claims were a low priority. The claimant states that he called the DA's office again in August 2005 and was told that it would take two years and not to call for a while. The claimant states that he contacted the DA's office again in March 2006 and was told that the statute of limitations had run out and that they could therefore not pursue his claim. The claimant states that the DA's office made no attempt to contact him until one day before the statute of limitations ran out and that, although they were not able to reach him at that time, even if they had reached him, there would have been insufficient time to prepare the claim in one day. The claimant believes that the Oconto County DA was negligent in the handling of his wage claim and requests reimbursement for his lost wages.

The Oconto County District Attorney recommends denial of this claim. The claimant's wage claim was received by the DA's office on May 13, 2004, with a statute of limitations of March 16, 2006. The DA states that, although he does not recall the exact conversations with the claimant, he has no doubt that he told him that wage claims were not a priority and that he would have to wait. The DA states that he attempted to locate the claimant on March 15, 2006, one day before the statute of limitations, however he was unable to reach the claimant at the phone number provided because the claimant had apparently moved. The DA did not have any other contact information for the claimant and therefore closed the file. The claimant called the DA's office in April 2006 and the DA informed him that the statute of limitations had expired. The DA believes that it was the claimant's responsibility to notify the office of his new contact information and that it was the claimant's failure to do so that resulted in the claim not meeting the statute of limitations deadline.

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 which the state should assume and pay based on equitable principles.
[Member Lazich dissenting.]

4. Ronald A. Keith, Sr. of Winnebago, Wisconsin claims \$2,900.00 for the amount of a loan to purchase a computer and related equipment and software. The claimant was a patient at a mental health facility pursuant to involuntary commitment. In 1995, the claimant took out a student loan to take college courses. He states that \$2,800 of that loan was used to purchase a computer and related computer equipment and software for his classes. In 1997, before the claimant had an opportunity to complete his coursework, the Department of Health and Family Services confiscated his computer, along with the computers of other patients, alleging that they had been used to create gang-related material. The claimant states that DHFS later admitted that no gang-related material was found on any of the seized computers. The claimant alleges that DHFS verbally agreed to reimburse him for the cost of the computer and related software and equipment. The claimant states that he is still expected to pay back the loan, even though he no longer has his computer. The claimant states that he did not file an action under

§ 51.61(7)(a), Stats., protesting the seizure of the computer because he was busy with his coursework, and because he and other patients were being represented through a class action and he was therefore not able to proceed with an additional pro se action. He requests reimbursement for the cost of the computer loan.

The Department of Health and Family Services recommends denial of this claim. DHFS states that the seizure of the computers was a legitimate government action, which has been adjudicated through the appropriate grievance procedure. DHFS points to the fact that the claimant could have filed an action in circuit court pursuant to § 51.61(7)(a), Stats., but chose not to do so. DHFS further points to the fact that the claimant is certainly familiar with this

process, having filed over 100 separate court actions against various state agencies and employees since 1994. DHFS contacted UW Superior, through which the claimant conducted his coursework. UW Superior stated that loans are used first for tuition, fees, books, room and board (if applicable). If there are any remaining monies, those monies are remitted to the student and could at that time be used for a purchase such as a computer. DHFS states that, according to UW Superior's records, the claimant's 1997 tuition fees and books totaled \$1,421.50. UW Superior can find no record of any check issued to the claimant for any remaining money. Finally, DHFS points to the fact that the claimant has not provided any documentation showing the actual purchase of a computer, the date of the purchase and/or the cost.

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 which the state should assume and pay based on equitable principles.

5. Milwaukee Wave, LLC of Milwaukee, Wisconsin claims \$12,000.00 for refund of late fees, interest and penalties related to late filed sales tax returns. The claimant states that in May 2004, its new Chief Operating Officer discovered incomplete and inaccurate accounting records, as well as sales tax returns that had not been filed. He hired a new accountant and accounting firm, which had to reconstruct the company's financial records. The claimant states that this process took 8 months to complete. Following the reconstruction of these records, a change in company ownership took place by a legal process that took several months, during which some company activity was frozen. The claimant states that the sales tax returns were completed as soon as possible after the changes in the ownership, management and accounting services took place. The claimant states that its sales taxes are all current and are now being made by monthly electronic payments. Because of the extenuating circumstances, the claimant is requesting reimbursement of 50% of the late fees, interest and penalties that were paid in association with the late filed returns.

The Department of Revenue recommends denial of this claim. DOR states that late filing fees and negligence penalties are imposed on untimely returns unless the taxpayer shows that the late filing was due to reasonable cause and not due to neglect. Examples of reasonable cause would be disastrous occurrences such as death, flood, fire, and so forth. DOR strongly believes that, in the absence of such reasonable cause, these penalties should remain. DOR points to the fact that many of the tax periods relating to this claim remain open for the claimant to claim a refund of the fees and penalties directly from DOR. DOR therefore recommends that the board deny the portion of the claim relating to periods not open to adjustment. DOR further recommends that the Claims Board deny the portion of the claim relating to periods that are still open to adjustment and states that DOR will refund to the claimant 50 % of the negligence penalties paid for those periods still open to adjustment.

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 which the state should assume and pay based on equitable principles.

6. Laura A. Symicek (formerly Outland) claims \$2,635.20 for tax refunds which were applied to delinquent taxes. The claimant married Virgil Outland in January 1995. The claimant states that Mr. Outland ran his own business and that she was a full time mom. The claimant alleges that Mr. Outland was very controlling and abusive during the marriage and that he controlled the finances and would not let her deal with any tax issues. The claimant states that she discovered that Mr. Outland had sexually assaulted her daughter over a period of 3 years and she immediately filed for divorce. Mr. Outland pled guilty and was sentenced to 19 years in prison in July 2003. The claimant states that as soon as Mr. Outland was removed from her home, she filed the missing returns and applied for Innocent Spouse Relief, which was granted. However, several tax refunds, which had been applied towards the unpaid taxes, were not refunded. The claimant states that she has worked very hard to rebuild her life and requests refund of those returns.

The Department of Revenue recommends denial of this claim. § 71.10(6), Stats., provides that an innocent spouse may be relieved of liability for taxes unpaid on the effective date of the statute, which is July 27, 2005. DOR records indicate that in 2003 the taxpayers jointly filed returns for 2000-2002. All three returns resulted in refunds, which were applied to

the delinquent taxes, with the exception of a small portion of the 2002 refund. In 2005, DOR granted the claimant innocent spouse relief for the remaining unpaid debts for 1996, 1997 and 1999 in the amount of \$13,046.84. DOR states that the refunds the claimant is requesting were intercepted prior to the claimant obtaining innocent spouse relief and prior to July 27, 2005. These refunds therefore have not been returned because they do not qualify as taxes that "remain unpaid" as of the effective date of the innocent spouse statute.

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 which the state should assume and pay based on equitable principles.

7. Gordon Ray of Madison, Wisconsin claims \$50.00 for insurance deductible paid after destruction of his cell phone. In February 2006, the claimant, a Capitol Police Officer, responded to a call for a broken water pipe in the Capitol Building. The claimant states that his personal cell phone fell off his belt into the water and was destroyed while he was attempting to shut off the water flow. The cost to replace the phone was a \$50 deductible, for which the claimant requests reimbursement.

The Department of Administration recommends denial of this claim because it does not believe the state was in any way negligent in this matter. The department does not dispute the facts as presented by the claimant and does not object should the Claims Board decide to approve the claim based on equitable grounds.

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 which the state should assume and pay based on equitable principles. [Member Rothschild not participating]

8. Daniel F. Salopek of Sister Bay, Wisconsin claims \$3,006.10 for the cost of three months of health insurance. The claimant is employed by the Department of Commerce. In March 2005, he underwent hip replacement surgery and suffered complications, which resulted in an extended medical leave. The claimant was cleared by his doctor to return to work on October 3, 2005. The claimant states that on October 3, 2005, he was contacted by his supervisor and Human Resources and was told that he could not return to work until additional clarification of his work abilities was received from his physician. The claimant states that he was told this would only take a few days. The claimant points to the fact that the department did not contact his physician in writing until October 31st. The claimant states that the department did not allow him to return to work until January 3, 2006. The claimant denies that he refused to return to work from December 20th until after the holidays, but states that Human Resources had told his union steward that he should delay until January 3rd because his income continuation had been paid out until that date. Because of the delay, the claimant was required to pay the full cost of three months of health insurance in the amount of \$3,171.10. Because of his ongoing medical needs, the claimant had no choice but to pay the full cost of the insurance, but made the payments under protest. The claimant states that his insurance costs normally would have been \$165 for that three month period. The claimant alleges that he was assured by his union steward that he would be reimbursed at a later date. The claimant does not believe that he should be held responsible for delays caused by the department's inadequate pursuit of the additional clarification, or by his physician's slow response.

The Department of Commerce recommends denial of this claim. On September 28, 2005, the department received recommendations from the claimant's physician regarding his return to work restrictions. The department states that some of the restrictions noted by the physician were unclear and, rather than risk the claimant's recovery, the department notified him not to return to work on October 3rd until the physician clarified his recommendations. A department Human Resource Specialist called the physician on October 7th and discussed with him the need for additional clarification before the claimant could return to work. Having not received the requested clarification in response to this call, the department wrote the physician on October 31st, again requesting the information and pointing out that the claimant's return to work was being delayed until the clarification was received. The department received a November 2nd letter from the physician giving some additional clarification but stating that a more thorough assessment of the claimant's abilities was to be completed in on month's time,

after which the physician would be able to make a more complete recommendation regarding the claimant's work restrictions. On December 12th the department received the additional recommendations from the physician. The department attempted to reach the claimant by phone and then contacted him by letter approving his return to work on December 20th. On December 27th, the department received a letter from the claimant stating that he would not return to work until January 3, 2006. The department believes that it adequately pursued the additional information and expressed the urgency of the situation to the physician and therefore should not be held responsible for the physician's delayed response to the departments requests. The department also believes it was the claimant's choice to delay his return to work from December 20th to January 3rd.

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 which the state should assume and pay based on equitable principles.

The Board concludes:

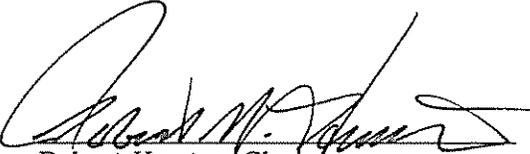
1. The claims of the following claimants should be denied:

Paul W. Barrows
Tracy L. Delrow
Ronald A. Keith, Sr.
Milwaukee Wave, LLC
Laura A. Symicek
Gordon Ray
Daniel F. Salopek

2. Payment of the following amounts to the following claimants from the following statutory appropriations is justified under s. 16.007, Stats:

Anthony T. Hicks	\$78,030.86	§ 20.505 (4)(d), Wis. Stats.
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Dated at Madison, Wisconsin this 17TH day of DECEMBER, 2006.


Robert Hunter, Chair
Representative of the Attorney General


John E. Rothschild, Secretary
Representative of the Secretary of Administration


Nate Zolik
Representative of the Governor


Mary Lazich
Senate Finance Committee


Dan Meyer
Assembly Finance Committee

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on December 13, 2006, upon the following claims:

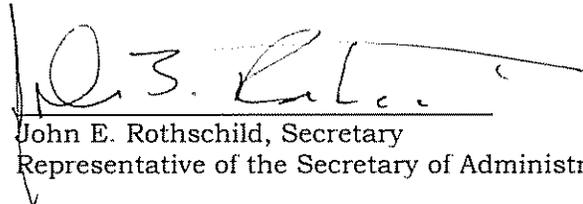
<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
Richard A. Moeck	Innocent Convict (§ 775.05, Wis. Stats.)	\$40,975.00

The Board Finds:

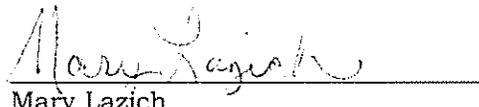
The Claims Board referred this claim to a hearing examiner on December 9, 2005. A hearing was held before Administrative Law Judge Peter C. Anderson of the Division of Hearings and Appeals on June 21, 2006. Judge Anderson has submitted to the Claims Board a Proposed Decision. The Board concludes that the attached Proposed Decision should be adopted as the decision of the Claims Board and that the claim of Richard A. Moeck should be denied.

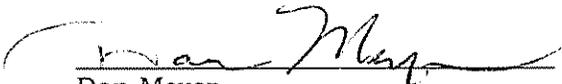
Dated at Madison, Wisconsin this 27TH day of DECEMBER, 2006.


Robert Hunter, Chair
Representative of the Attorney General


John E. Rothschild, Secretary
Representative of the Secretary of Administration


Nate Zolik
Representative of the Governor


Mary Lazich
Senate Finance Committee


Dan Meyer
Assembly Finance Committee



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Claim of
Richard A. Moeck

Case No. CB-06-0001

PROPOSED DECISION

PRELIMINARY FINDINGS

1. By claim dated November 28, 2005, Richard Moeck requests compensation from the State of Wisconsin through the Wisconsin Claims Board. On January 12, 2006, the Claims Board referred the claim to the Division of Hearings and Appeals for hearing. The matter asserted is that Moeck is entitled to compensation as an innocent person convicted of a crime. Jurisdiction is conferred by Wis. Stat. § 775.05 and § 227.43.

2. Pursuant to Wis. Stat. § 227.47(1), the following persons or entities participated in and are certified as PARTIES to this proceeding:

Richard A. Moeck, *pro se*
2640 Rimrock Road
Madison, WI 53713

The State of Wisconsin (herein, "the state"), by

Scott Horne
La Crosse County District Attorney
333 Vine Street, #1100
La Crosse, WI 54601-3296

3. A hearing was held June 21, 2006, at the Wisconsin Department of Administration, Madison, Wisconsin, Peter C. Anderson, Administrative Law Judge, presiding. District Attorney Horne and witness Christopher Sader attended the hearing by teleconferencing. In addition to the hearing record, the parties agreed to the following portions of the transcript and exhibits from Mr. Moeck's criminal case (La Crosse County Circuit Court Case No. 97-CF-468) being made part of the evidentiary record: First trial (January 15, 1998): the testimony of Christopher Sader and Richard Moeck; Second trial (March 11, 1998): the testimony of Christopher Sader and Richard Moeck; Third trial (March 15, 2000): the testimony of

Christopher Sader and Robert Abraham; Fourth trial (November 1-3, 2000): all exhibits and the testimony of all witnesses; Post-conviction motions hearing (August 29 and September 5, 2002): all exhibits and the testimony of all witnesses. For purposes of this decision, the exhibits from the post-conviction motions hearing were renumbered by adding 100 to the original exhibit number (thus, exhibit 1 became exhibit 101, exhibit 2 became exhibit 102, and so on). Additional exhibits submitted by Moeck (Exs. 201-203) were received at hearing.

4. The claim presents the following issues:
 - a. Whether the evidence is clear and convincing that Richard Moeck was innocent of the crimes for which he was convicted in La Crosse County Circuit Court Case No. 97-CF-468.
 - b. If the evidence is clear and convincing evidence that Moeck was innocent of the crimes for which he was convicted, whether Moeck contributed to bring about the conviction and imprisonment for which he seeks compensation by his act or failure to act.
 - c. If the evidence is clear and convincing that Moeck was innocent of the crime for which was convicted and if he did not contribute to bring about his conviction and imprisonment by his act or failure to act, the amount that will equitably compensate him.

Based on the entire record of the case, the administrative law judge recommends that the Claims Board adopt the following Findings of Fact, Conclusions of Law and Order as the final decision in this matter.

FINDINGS OF FACT

5. On August 2, 1997, Richard Moeck was arrested and subsequently charged with two counts of first degree sexual assault/use of a weapon, false imprisonment, intimidation of a victim through the use or attempted use of force, robbery with use of force, battery, and misdemeanor bail jumping. Moeck was charged on all counts as a repeater or habitual criminal. (CCAP records) The alleged victim was Christopher Sader, a twenty-three year old La Crosse resident.

6. A trial held January 1998 resulted in a hung jury. Moeck was retried in March 1998. This time, he was convicted on all counts and sentenced to two years in prison on the bail jumping and battery counts, seven years on the false imprisonment count, ten years on the victim intimidation count, and forty-eight years on the sexual assault and robbery counts. (CCAP records)

7. The Wisconsin Court of Appeals overturned Moeck's convictions based on the trial court's error in advising the jury that Moeck was being tried as a repeater. *State v. Moeck*, No. 99-0232-CR (Wis. Ct. App., Oct. 21, 1999, unpublished decision) (copy attached to

November 28, 2005, claim). Moeck was tried a third time in March 2000. In his opening statement, defense counsel provided an alternative version of events to that put forward by the prosecution; however, no witness (including Moeck) testified to this alternative version. The prosecution requested a mistrial at the conclusion of the third trial, which the trial court granted. Moeck was tried a fourth time on November 1-3, 2000. Moeck was again convicted on all charges, and given the same prison sentence as before, except that the sentence on the battery conviction appears to have been increased to three years. (CCAP records)

8. Moeck's conviction was subsequently overturned on double jeopardy grounds. *State v. Moeck*, 2004 WI App 47, 270 Wis. 2d 729, 677 N.W.2d 658, *aff'd* 2005 WI 57, 280 Wis. 2d 277, 695 N.W.2d 783, *cert. denied*, 126 S. Ct. 551 (2005). Moeck was released from prison on or about November 3, 2005, having been continuously incarcerated since his arrest on August 2, 1997. Some of Moeck's confinement would have been due to his being held while awaiting trial. Because this would have been credited against his sentence, it is properly treated as part of the period of imprisonment for which compensation is sought.

9. There is no dispute that Christopher Sader was in Richard Moeck's apartment between approximately 3:00 and 7:30 a.m. on August 2, 1997. It is also undisputed that the only persons who directly witnessed what occurred were Sader and Moeck. Moeck was nearly 50 in August, 1997, while Sader was 23 years old.

10. While Moeck contends that Sader has been inconsistent in his account, Sader has essentially provided the following description of events. Sader was in downtown La Crosse around bar time on his bicycle, hoping to meet someone he knew. Moeck was on the street on foot and shouted to Sader, "Hey, I know you. You're a pretty good pool player." After speaking with Moeck, Sader went with him to his apartment to attend an informal party that would involve playing pool. Moeck lived on the second floor of an apartment building located above a bar in downtown La Crosse. According to Sader, they accessed the apartment by going up the fire escape and through a fire exit. No one else was in Moeck's apartment when they arrived, and there was no pool table. Sader began watching television. Moeck put a knife to Sader's throat and ordered him first to undress, and then to begin masturbating. Moeck provided Sader with one or more magazines with pictures of naked women to look at. Moeck masturbated while Sader was masturbating. Moeck also performed felatio on Sader. Sader did not ejaculate. Moeck then had Sader stand facing the wall. If Sader looked at Moeck, Moeck would backhand him. Moeck had Sader smoke some marijuana to calm him. While his back was to Moeck, Sader heard the sound of Velcro opening and believed Moeck was opening his wallet. After leaving the apartment, Sader discovered between \$40 and \$60 missing from his wallet. Around 7:00 - 7:30 a.m., Moeck let Sader leave. Sader immediately went to the police, where he provided both a written and oral statement.

11. Moeck provided a much different account. According to Moeck, he and Sader had met at a bar in La Crosse about a month earlier, where they struck up a conversation and ultimately smoked a "joint" or marijuana cigarette in the parking lot. Sader told Moeck he sometimes sold marijuana, and Moeck stated he might be interested in buying some. Moeck told Sader where he lived. Moeck contends he was sleeping in his apartment during the morning of August 2, 1997. He was awakened at 3:09 in the morning by Sader knocking. According to

Moeck, Sader stated he had taken either LSD or ecstasy and had also been drinking. Sader asked to "crash" at Moeck's apartment, and Moeck consented, letting Sader sleep on the mattress. Around 7:00 a.m., Moeck woke up and woke up Sader. Sader produced a bag containing an ounce of marijuana and proceeded to roll a joint. Although Moeck stated he did not want as much marijuana as Sader was selling, he produced \$120, which he placed on the table, to demonstrate his ability to make a purchase. After the two smoked the joint, Moeck went to the bathroom, located in the hallway outside the apartment. When he returned, the \$120 he had left on the table was missing. Moeck confronted Sader about the missing money, and Sader initially denied taking it. Moeck is a large man and larger than Sader. Moeck pushed Sader up against the wall, grabbing him by the collar. Sader admitted taking the money and returned it to Moeck. Moeck forcibly evicted Sader from the building, who exited through the fire door and down the fire escape.

12. While the victims of crimes are often envisioned as innocent, it is not uncommon for victims and their assailants to share similar criminal pasts. In the present case, both Sader and Moeck have lengthy criminal histories. Sader had admitted to lying to the police on other occasions.

13. Sader was not a particularly credible witness. Relying principally on the transcript from the third trial, Moeck identifies several instances in which Sader's testimony was either inconsistent with earlier versions or appeared illogical. The most important instance concerns the timeline. It is hard to envision Moeck forcing Sader to masturbate and to submit to Moeck's felatio for a period of four to four and a half hours. If the assault did not take this long—and Sader seemed to acknowledge that it did not—what else was going on? Sader mentions Moeck having him stand facing the wall, but his description is not one of having to stand in this position for three to three and half hours. It is also hard to understand Sader's not having to use the bathroom, given the length of time he was in Moeck's apartment and the fact that he had just finished drinking three beers. Sader did not mention a need in this regard.

14. There are other significant instances in which Sader gave what appeared to be inconsistent or inherently implausible accounts. One had to do with when Moeck's allegedly performed felatio. The police report has Sader stating that this occurred while Sader was standing, with Moeck holding the knife to Sader's stomach. (Ex. 201) Sader testified that it happened while he was lying on the mattress. A similar instance had to do with the alleged theft from Sader's wallet. The police report indicated that this occurred while Sader was standing, facing the wall, while Sader testified to hearing the sound of Velcro opening while he was on the mattress. Sader also told the police that he thought he had one \$20 bill and two \$10's in his wallet. While \$792 was recovered from Moeck's wallet when he was arrested, his currency did not include any \$10 bills. Moeck also points out that for having just been sexually assaulted at knifepoint, Sader showed unusual slowness in leaving the apartment after Moeck let him go. (See Moeck Br. at 11)

15. This hearing examiner had the opportunity to observe Sader as a witness first-hand. Moeck's cross-examination of Sader was attacking and *ad hominem* and did little to undercut his credibility. Moeck's contention that Sader lied right off the bat by denying that he spoke with anyone about the current proceedings is unconvincing. Sader was in custody at the

time of the hearing, was served with a subpoena by the District Attorney's Office only the day before, attended the hearing in handcuffs, and probably had little understanding of what was going on. That Mr. Horne spent a minute or two explaining why he was attending a hearing involving his alleged assailant, nearly nine years after the alleged assault, was not the kind of discussion of a contested case that one would necessarily understand was being asked about as framed by Moeck's questioning.

16. On the other hand, Sader was unable to answer the straight-forward question of whether Moeck had struck him about the head and shoulders (as set out in the August 2, 1997, police application for a search warrant). Moeck first asked this question, followed by the hearing examiner, with Sader claiming he could not recall, and explaining his lack of memory as due to an attempt to forget the assault. To this hearing examiner, Sader did not appear to be truthful in this response. However, the impression this left was not that Sader's claimed lack of memory indicated that he had not been assaulted, so much as that Sader was unwilling to expend much effort in assisting Moeck, the state, or the hearing examiner in a proceeding that he did not fully comprehend.

17. Other claimed inconsistencies in or illogical aspects to Sader's account that Moeck identifies appears less telling. Whether Sader was walking his bike, as the police report indicates, or riding it, as Sader testified, is the kind of detail that can easily become confused in the second-hand recording of a crime. Moeck points out that when Sader and Officer Abraham returned to the apartment building later in the morning on August 2, 1997, the fire door was closed and locked. However, there is no reason Moeck could not have locked the door, which presumably had been propped open when he and Sader arrived, once Sader had left.

18. Other parts of Sader's story evince a reasonable degree of believability. According to Sader, he happened to hook up with Moeck when Moeck saw him on the street and called out, "Hey, I know you. You're a pretty good pool player." Moeck has a very distinctive manner of speech. It is very easy to hear Moeck using these words to call Sader over. When Sader arrived at the police department, he was shaking and barely able to speak. Sader's story, if made up, was manufactured in a very short period, contained a good deal of detail, and was generally consistent with the limited physical evidence.

19. In contrast to Sader's qualities as a witness, Moeck came across in these proceedings as a man fully convinced of his innocence. Moeck is not highly educated and openly admits to being very angry. Despite these qualities, he comes across as having a reasonably high level of native intelligence and on most occasions was well-mannered towards the undersigned. In both writing and speech, Moeck at times employs colorful language to express complete and utter disdain for Sader, District Attorney Horne, Robert Abraham, the police officer who first investigated the alleged crime, and others. The apparent strength of Moeck's claim of innocence constitutes evidence that he is in fact innocent. At the same time, this office sees many individuals who have committed crimes, and has had the opportunity to hear a number of offenders indignantly proclaim their innocence in the face of evidence clearly indicating otherwise. Expressions of apparent sincerity are better evaluated against standards of internal consistency, objective record evidence, and common sense, than by tone of voice alone. In weighing the evidence, this decision recognizes that some criminals, although guilty, can

come to develop a passionate hatred for those who have accused and prosecuted them, displaying a real sense of grievance at having been convicted. It is possible for Moeck's indignation over being tried four times and sentenced to decades of imprisonment—in apparent violation of the prohibition against double jeopardy—to have become transformed into a claim of outright innocence.

20. Moeck provided his story officially three times--in testimony at his first and second trials, and in testimony at the hearing on the instant claim. The accounts were not lengthy, but appeared to have a level of detail consistent with truthfulness. Moeck's stories exhibited facial plausibility and were largely consistent. The only inconsistency this examiner noted was that Moeck initially said Sader had taken LSD, while he later described Sader as having used the drug Ecstasy. This was not viewed as a significant difference.

21. While these considerations tend to support Moeck's claim of innocence, their import is lessened by Moeck's failure to tell the police his story within a reasonable time after being arrested. It is prudent for a person arrested of a serious crime, although innocent, to await the retention of counsel before discussing the charges with the police. However, it can generally be expected that an innocent person will take the first opportunity after speaking with counsel, if not before, to proclaim his innocence. The record does not indicate this occurring.

22. If Moeck were strongly or unqualifiedly heterosexual, this would be evidence supporting his claim of innocence. That is, it is difficult to conceive of a wholly heterosexual perpetrator engaging in a homosexual assault, with the perpetrator performing felatio on the victim and masturbating while the victim is made to masturbate.

23. The evidence of Moeck's sexual orientation consists of Moeck's testimony denying any homosexual tendency. Moeck testified that he has been married twice, with three children by his second marriage. In and of itself, this does not prove sexual orientation. It would seem possible for Moeck to introduce evidence of a wholly heterosexual orientation--possibly by the testimony of an ex-wife or other sexual partner; more likely through a forensic or psychological expert capable of determining sexual orientation. The absence of evidence of a wholly heterosexual orientation, other than by means of Moeck's testimony, results in a lack of support for Moeck's claim of innocence.

24. This decision does not conclude, as the state suggests that it conclude, that it was implausible for Sader to show up at Moeck's apartment at 3:00 in the morning needing a place to sleep and hoping to sell Moeck marijuana. Sader and Moeck appear to have lived on the margins of society. More unusual things have happened than Sader's remembering Moeck's address one month after what would have been his and Moeck's first and only encounter.

25. Excluding the DNA evidence, the physical evidence, while limited, does not significantly controvert, and may in fact tend to support, Sader's account. Two sizable knives were found in Moeck's apartment (Ex. 8), although Sader did not identify either as being the one held to his throat. At the same time, the ownership of large kitchen knives is fairly common. Magazines with pictures of nude women were recovered from Moeck's apartment (Ex. 7), although this would also tend to buttress Moeck's assertion of heterosexuality.

26. The DNA evidence does not appear to support Moeck's claim of innocence. Six spermatozoa or sperm heads were recovered from an oral swab taken from Moeck six or more hours after the alleged assault. This would have been consistent with the presence of pre-ejaculation seminal fluid, which can contain spermatozoa. The state concluded that there were too few sperm heads to make a DNA match. (4th Trial, Andreas testimony) Following the fourth trial, Moeck retained experts who attempted this match. In an affidavit, Moeck's principal expert, Dr. Friedman, opined that the spermatozoa were consistent with Moeck's DNA but not with Sader's. (Ex. 203) Upon cross-examination, however, Dr. Friedman conceded that what might have been detected in the "sperm sample" were epithelial cells from Moeck's mouth. (*See also* Post-Conviction Mot. Hrg., Andreas testimony) That DNA from epithelial cells from Moeck's mouth was consistent with Moeck's but not Sader's DNA is an unremarkable result with no bearing on the question of guilt or innocence.

27. More significant for purposes of answering the question of guilt or innocence is that spermatozoa were detected in Moeck's mouth at all. Absent the ability to conduct definitive DNA testing, two logical possibilities seem paramount, both of which would be consistent with Moeck's guilt: The spermatozoa were either Moeck's or Sader's. If they were Sader's, then this would have been consistent with Sader's claim that Moeck performed fellatio on him, even though Sader did not ejaculate. If the sperm were Moeck's, then this fact would seem consistent with Sader's claim that Moeck masturbated while forcing Sader to masturbate. In any event, no witness testified that some amount of sperm from Moeck masturbating could not have found their way into Moeck's mouth through, for example, incidental hand-mouth contact.

28. Moeck provided a third explanation for spermatozoa being in his mouth. According to Moeck, he spent the evening of August 1, 1997, with a married woman he was dating by the name of Sue Kleinschmidt. Moeck claimed that Ms. Kleinschmidt performed oral sex on him and then brushed her teeth with his toothbrush. Moeck's sperm made its way into his mouth when he later brushed his teeth with the same toothbrush. According to Moeck, Ms. Kleinschmidt left his apartment by 1:00 in the morning.

29. The problem with this explanation is that there is no evidence of Moeck's mentioning his August 1, 1997, date with Sue Kleinschmidt to anyone until after his experts provided testimony (later qualified upon cross-examination) suggesting that the six spermatozoa were Moeck's. At his first trial, Moeck testified that he had worked a full, hot August day and was tired and that he went to sleep around 11 to 12. It was not simply the authorities who were kept in the dark about Ms. Kleinschmidt. Moeck's original attorney indicated at the post-conviction hearings motion that Moeck had not mentioned his evening date with Ms. Kleinschmidt, although he did mention a relationship with a married woman. (*See* Burgos testimony) Moeck provided a dual explanation for his silence regarding Ms. Kleinschmidt. First, until someone was able to perform DNA testing on the small number of spermatozoa, his relations with Ms. Kleinschmidt were not relevant. Second, Moeck understood that the prosecution would attempt to drag Ms. Kleinschmidt "through the mud" if he disclosed her existence.

30. Unfortunately for Moeck, no one was ever able to locate Sue Kleinschmidt or corroborate her existence. (See Post-Conviction Mot. Hrg., Condon testimony; Claims Bd. Hrg., Moeck testimony)

31. Moeck's explanations for not mentioning Ms. Kleinschmidt earlier are implausible and taken in conjunction with the inability to locate Ms. Kleinschmidt leave this hearing examiner with the belief that Moeck was not truthful regarding his claimed evening encounter with this woman, and that his date with Ms. Kleinschmidt on the evening on August 1, 1997, was fabricated precisely to provide an explanation for the small number of spermatozoa recovered from his oral swab.

32. Moeck is wrong that an evening date with Ms. Kleinschmidt which culminated in her performing oral sex could not have been relevant at his trials. Even without the ability to do DNA testing, this evidence could have explained the presence of spermatozoa in Moeck's oral swab. Moreover, it would have buttressed Moeck's claim that he had been sleeping at 3:00 in the morning to know that he had finished spending an evening and having sexual relations with a woman around two hours earlier. It would have also painted the picture of a man whose heterosexuality would have been inconsistent with the claimed homosexual assault.

33. It is also hard to imagine Richard Moeck refusing to disclose the identity of a woman who could help establish his innocence of crimes for which he might be imprisoned for decades if convicted, out of what were essentially chivalrous motives. Because his communications with counsel would have been confidential, Moeck could be expected to have mentioned his time with Sue Kleinschmidt to his attorney without risking her disclosure, had the claimed evening date actually occurred.

34. The impression that Moeck was not truthful regarding his claimed evening date with Sue Kleinschmidt makes it more difficult to believe Moeck's other testimony.

CONCLUSIONS OF LAW

35. Wisconsin Statutes § 775.05(1)-(4) provides:

Compensation for innocent convicts. (1) The claims board shall hear petitions for the relief of innocent persons who have been convicted of a crime.

(2) Any person who is imprisoned as the result of his or her conviction for a crime in any court of this state, of which crime the person claims to be innocent, and who is released from imprisonment for that crime after March 13, 1980, may petition the claims board for compensation for such imprisonment. Upon receipt of the petition, the claims board shall transmit a copy thereof to the prosecutor who prosecuted the petitioner and the judge who sentenced the petitioner for the conviction which is the subject of the claim, or their successors in office, for the information of these persons.

(3) After hearing the evidence on the petition, the claims board shall find either that the evidence is clear and convincing that the petitioner was innocent of

the crime for which he or she suffered imprisonment, or that the evidence is not clear and convincing that he or she was innocent.

(4) If the claims board finds that the petitioner was innocent and that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment. Compensation awarded by the claims board shall include any amount to which the board finds the petitioner is entitled for attorney fees, costs and disbursements. If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172(2).

36. As was explained to Mr. Moeck on several occasions during these proceedings, an innocent convict claim is not a civil rights claim. Thus, in and of itself, the fact that he was tried and convicted in apparent violation of his right not to be subjected to double jeopardy is not a basis upon which the Board can award compensation.

37. The Board is also not required to choose between Sader's account and Moeck's. It is possible that neither man has been wholly truthful or wholly untruthful and that what really happened on the morning of August 2, 1997, is some combination of the two men's stories, as well as facts not known. For example, it is possible that Sader picked Moeck's apartment to show up at because he was in the vicinity and recalled Moeck's expressing interest in buying some pot. Sader might have "crashed" on Moeck's mattress and in the morning attempted to rip Moeck off after offering to sell him drugs. Moeck might have retaliated by humiliating Sader sexually at knifepoint, such as by having him strip and masturbate. Sader would have a clear motive not to admit to selling drugs, while Moeck would have every reason to deny assaulting Sader.

38. The Board is not required to determine what precisely occurred on the morning of August 2, 1997, except to determine whether it has been clearly and convincingly proven that Moeck was innocent of the crimes for which he was convicted.

39. The burden of proof in this case, while not the exact legal opposite of the beyond the reasonable doubt standard the state is required to meet in a criminal prosecution, requires evidence establishing Moeck's innocence by clear and convincing evidence. This decision does not defer to or rely on the jury verdicts reach in Moeck's criminal cases, but evaluates the evidence presented by the parties *de novo*. Nevertheless, it is fair to ask, if one jury could not decide, and two juries found Moeck guilty (Moeck's third jury did not deliberate), applying a standard that required the prosecution to establish guilt beyond a reasonable doubt, what new evidence has been presented in this proceeding that is capable of persuading a new trier of fact that Moeck was innocent under the clear and convincing standard? The answer is that the only real new evidence consists of the DNA evidence and Moeck's explanation of Sue Kleinschmidt performing oral sex the night before. As the discussion of this additional evidence discloses, it does little to strengthen Moeck's claim of innocence.

40. Weighing all the evidence, including evidence bearing on the credibility of the witnesses, this decision finds that the evidence is not clear and convincing that Moeck was innocent of the crimes for which he was convicted. Accordingly, it is not necessary to reach the issue of whether Moeck contributed to his being convicted or the amount required to compensate him for his period of imprisonment.

41. There remains significant evidence that Moeck was guilty of the crimes for which he was convicted. Sader went to the police immediately after leaving Moeck's apartment, appeared very shaken, and provided a detailed account that was largely consistent with the physical evidence. Moeck did not protest his innocence when arrested, and later came up with a story about an evening date with a woman no one was ever able to track down, and which story appears to have been fabricated to explain spermatozoa recovered from his oral swab. Moeck's apparent lack of honesty concerning Sue Kleinschmidt undercuts the credibility of his other testimony. Aside from Moeck's denial, the main evidence that he was innocent consists of his attacks on Sader's credibility. While Moeck has succeeded in raising a number of issues concerning Sader's credibility, the attacks on Sader are not sufficient to establish Moeck's innocence under the clear and convincing standard.

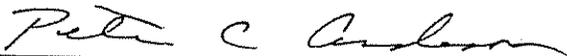
PROPOSED DECISION AND ORDER

For the reasons set forth above, IT IS ORDERED that the innocent convict claim of Richard Moeck for compensation for his imprisonment resulting from his conviction in Case No. 97-CF-468 is DENIED.

Dated at Madison, Wisconsin on September 13, 2006.

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By: _____



Peter C. Anderson
Administrative Law Judge