STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings at the Department of Administration Building, St. Croix Room, Madison, Wisconsin, on December 19, 2002, upon the following claim:

Claimant	Agency	Amount
Frederick Saecker	Innocent Convict (s. 775.05, Wis. Stats.)	$25,000.00+

The Board Finds:

The Claims Board referred this claim to a hearing examiner on December 7, 2001. On May 30, 2002, a hearing on the claim was held before Administrative Law Judge Peter C. Anderson of the Division of Hearings and Appeals. Judge Anderson has submitted to the Claims Board a Proposed Decision for the claim as well as a Proposed Decision on the Award of Attorney's Fees and Costs. After consideration of the information submitted, the Board concludes that the evidence is clear, satisfactory and convincing that the prisoner was innocent of the crime for which he suffered imprisonment. The Board concludes that the attached Proposed Decision should be adopted as the decision of the Claims Board and that Frederick Saecker should be paid the amount of $25,000.00 pursuant to section 775.05 (4), Wis. Stats. The Board further concludes that the attached Proposed Decision on the Award of Attorney's Fees and Costs should be adopted as the decision of the Claims Board and that Attorney John D. McKenzie should be paid the amount of $20,000.00 as permitted under section 775.05 (4), Wis. Stats. Under authority of s. 16.007 (6m), Wis. Stats., the Board concludes that these payments should be made from the Claims Board appropriation s. 20.505 (4)(d), Wis. Stats.

Dated at Madison, Wisconsin this 16th **day of January 2003.**

Alan Lee, Chair
Representative of the Attorney General

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

Amanda Schaumburg
Representative of the Governor

Sheryl Albers
Assembly Finance Committee

Before The

State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Claim of

Fredric Saecker

Case No. CB-01-0004

PROPOSED DECISION

By claim dated July 6, 1999, Fredric Saecker requests compensation from the State of Wisconsin through the Wisconsin Claims Board. On December 21, 2001, the Claims Board referred the claim to the Division of Hearings and Appeals for hearing. The matter asserted in this case is that Fredric Saecker is entitled to compensation as an innocent person convicted of a crime. Jurisdiction is conferred by Wis. Stat. § 775.05 and § 227.43.

Pursuant to Wis. Stat. § 227.47(1), the following persons are certified as PARTIES to this proceeding:

Fredric Saecker, by

Attorney John D. McKenzie
2360 Como Avenue
St. Paul, MN 55108

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

James Duvall
Buffalo County District Attorney
P. O. Box 337
Alma, WI 54610-0337

A hearing was held May 30, 2002, at the Sparta Free Library, Sparta, Wisconsin, Peter C. Anderson, Administrative Law Judge, presiding.

The case presents the following issues:

1. Is the evidence in this case clear and convincing that Fredric Saecker was innocent of the crimes for which he was convicted in Buffalo County Circuit Court Case Nos. 89-CF-33 and 89-CF-36?

2. If the evidence in this case is clear and convincing evidence that Fredric Saecker was innocent of the crimes for which he was convicted, did Saecker contribute to bring about the conviction and imprisonment for which he seeks compensation by his act or failure to act?

3. If the evidence in this case is clear and convincing that Fredric Saecker 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, what amount will equitably compensate him?

4. If Frederic Saecker is entitled to compensation under Wis. Stat. § 775.05(4), to what amount is he entitled for attorney fees, costs and disbursements?

FINDINGS OF FACT

1. On June 28, 1989, Carol Piechowski was at her home in Bluff Siding, Buffalo County, Wisconsin, where she lived with her husband and son. At around 12:30 in the morning, Ms. Piechowski was confronted by an assailant in her kitchen. He demanded her television, VCR and money, and when she began to scream, he beat her and then dragged her from the house. He dragged her down the driveway and then up and down her neighbor's driveway before being confronted by her husband, who had been awakened by her screams. The assailant warned Ms. Piechowski's husband not to come near them or else he would kill her. Mr. Piechowski returned to the home to call the police and get his revolver. When he returned, the assailant and his wife were gone. 9-1-1 records establish that Mr. Piechowski called the police at 12:39 a.m. (R. 5:2[1]; Trial Tr. (C. Piechowski testimony; R. Piechowski testimony))

2. The assailant pulled or dragged Carol Piechowski, who was wearing only underpants, west along Highway 35/54 and then south along Highway 54 (towards the bridge that crosses the Mississippi River) and raped her twice. (A copy of the map submitted by Saecker as Exhibit 5 to his September 13, 1999, Supplemental Submission (herein "Map") is attached to this decision.) He then left her in some bushes next to the boat landing near the Winona Interstate Bridge, approximately 1.3 miles from the Piechowskis' home. Following her assailant's instructions, Ms. Piechowski waited in the bushes before walking home. She was

[1] The evidentiary record in this case consists initially of exhibits filed as attachments to Saecker's September 13, 1999, Supplemental Submission (herein, Suppl. Submission). Additional record documents were submitted by the parties prior to hearing. While each party supplied separate documents, the numbering for both parties' documents is set out in District Attorney Duvall's February 27, 2002, filing letter. These documents are identified as "R. ___", using the numbering provided by Mr. Duvall. The trial transcripts and the transcript of the Post-Conviction Motion Hearing held June 2 and 3, 1994, are submitted as Record Documents 1-4. In this decision, they are identified simply as the trial transcript or the Post-Conviction Motion Hearing transcript, respectively. In addition, an evidentiary hearing was held on May 30, 2002, at which Saecker was the only witness to testify. Finally, at my request, District Attorney Duvall provided copies of the Judgments of Conviction in Case Nos. 89-CF-33 and 89-CF-36.

then found walking along the highway by a sheriff's officer about two blocks east of her home. (Trial Tr. (C. Piechowski testimony))

3. The assault of Ms. Piechowski would have ended no sooner than 1:05 a.m. It is very probable that the assault and kidnapping lasted longer than this.[2] (Inference from time and distance evidence)

4. The following evening, Frederic Saecker was arrested for the crime. (Trial Tr. (Saecker testimony)) A jury trial was held January 3-5, 1990. During the first phase of the trial, the jury found Saecker guilty of one count of burglary, two counts of sexual assault and one count of kidnapping. (Trial Tr. at 397-98) During the second phase of the trial, the jury determined that at the time the crimes were committed, Saecker had a mental disease, but found that Saecker did not lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. (Trial Tr. at 500) On February 20, 1990, Saecker was sentenced to fifteen years imprisonment on the sexual assault and burglary convictions and to twenty years probation on the kidnapping conviction. Sentence credit of two hundred thirty days was granted. (Judgments of Conviction) The convictions were upheld by the court of appeals in an unpublished decision dated January 29, 1991. (R. 5) Saecker was never paroled because a condition of his parole was the completion of recommended programming. Saecker could not take part in sex offender treatment because he refused to admit to having committed his offense. (Hearing Tr. (Saecker testimony))

5. Based on DNA evidence that did not become available until after the trial, on September 27, 1994, the trial court granted Saecker's motion for a new trial. (R. 7) The court of appeals affirmed the new trial decision on August 8, 1995. (R. 8) According to the parties, Saecker was released from confinement in May 1996. (Hearing stipulation) He had been continuously confined in jail (for which he received sentence credit) or prison since his arrest on June 28, 1989. Without conceding the possibility of Saecker's innocence, but acknowledging difficulties of proof, on October 22, 1996, the state moved to dismiss its complaint. (R. 8) Counting pre-trial sentence credit, Saecker had served over six years of his prison sentence by the time of the court of appeals' decision affirming the new trial grant.

6. In June 1989, Fredric Saecker was living at the El Rancho Motel in Winona, Minnesota. Winona is on the other side of the Mississippi River from Buffalo County. At that time, as currently, Fredric Saecker suffered from paranoid schizophrenia. In 1989, Saecker did not receive treatment for his mental illness. (Trial Tr. (Saecker testimony); Map; Suppl. Submission, Ex. 7 (Caillier Aff.); Post-Conviction Hearing Tr. (Caillier testimony); Hearing Tr. (Saecker testimony))

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[2] Although Saecker's attorney asserts that Ms Piechowski estimated that she was with her assailant for approximately 45 minutes, a citation to the record for this proposition was not provided. I could not find Ms Piechowski making this statement either at trial or in the portion of her statement to the police submitted as part of Saecker's Supplemental Submission. (*See* Suppl. Submission, Ex. 6)

7. During the early morning hours of June 26, 2002—that is, approximately 24 hours prior to Ms. Piechowski's assault—Saecker was stopped by the police in Buffalo County driving back to Winona and charged with driving while intoxicated. After being handcuffed and placed in the squad car, he escaped down an embankment, into a swampy area near the bridge to Winona. Saecker was apprehended and taken to the Buffalo County Jail. Saecker described his apprehension following his attempted escape as "physical." (Trial Tr. (Saecker testimony; Boese testimony))

8. Saecker was released from jail the following day and returned to Winona. Early in the evening of June 27, 1989, Saecker returned to Buffalo County, taking a cab from his motel in Winona to the Four Mile Club. (Trial Tr. (Saecker testimony); Suppl. Submission, Ex. 3 (Budnick statement) R. 17 (Yellow Cab log); R. 18 (Lovas statement)) The Four Mile Club is located along Highway 35/54, approximately 2.1 miles east of the Piechowskis' home. (Map) Saecker was drinking heavily and had been drinking for several days. (Trial Tr. (Saecker testimony); Hearing Tr. (Saecker testimony)) During the evening, Saecker took a cab back to Winona to get money from an ATM. An ATM slip discovered by Saecker's mother after trial showed that Saecker withdrew $40 from a Winona ATM at 11:30 p.m. on June 27, 1989. (Suppl. Submission, Ex. 4) Saecker then returned to the Four Mile Club. (R. 18 (Lovas statement); Suppl. Submission, Ex. 3 (Budnick statement))

9. There is no evidence that Saecker used or had use of a motor vehicle on the night of June 27-28, 1989. He traveled by cab from Winona to the Four Mile Club initially and from the Four Mile Club to the ATM in Winona and back. (R. 17 and 18) Saecker was later given a ride while walking west on Highway 35/54 in the direction of Winona. (Trial Tr. (Stephan testimony; Schwartz testimony; Saecker testimony))

10. Saecker testified at trial that he stayed at the Four Mile Club until most of the girls at the club had quit dancing, which would have been around 1:00 to 1:30 a.m. (Saecker testimony; Schwartz testimony) Brian Budnick, the bartender that night, gave a statement several years later to an investigator working for Saecker's attorney that Saecker had arrived at the bar around 8:00 p.m. and was at the bar a good three to four hours. According to Budnick, Saecker left the bar for about an hour to an hour and twenty minutes around 9:30 to 10:00 p.m. and then came back. Budnick believed Saecker left to get money from an ATM and recalled Saecker having his hand stamped to be able to get back into the bar when he returned. According to Budnick, from the time Saecker entered the second time, he remained in the Four Mile Club until closing or close to it. (Suppl. Submission, Ex.3) The parties were unable to locate Budnick by the time of the hearing in this case, and he did not testify and therefore was not subject to cross-examination.

11. By the time Saecker left the Four Mile Club, he had spent most of his money. (Saecker testimony; inference from Saecker's walking back to Winona; inference from Saecker's use of credit card at Happy Chef restaurant later that morning)

12. If Saecker had been Ms. Piechowski's attacker, it would have been physically possible from him to travel the 2.1 miles from the Four Mile Club to the Piechowskis' home

between the time that he returned to the Four Mile Club after getting money in Winona (around 11:45 p.m.) and the time that the Piechowskis' home was broken into (around 12:30 a.m.). (Inference from time and distance evidence) However, in that event, Saecker would have likely still had money from his trip to the ATM, since he would have been at the Four Mile Club a short time. No witness testified that Saecker left the Four Mile Club shortly after returning from his trip to the Winona ATM. No witness observed Saecker traveling in the direction or vicinity of the Piechowskis' home shortly before the break-in.

13. Saecker was offered a ride while walking, about 400 yards west of the Four Mile Club, at approximately 1:15-1:40 a.m. He was heading west, in the direction of Winona, which meant that he was heading in the direction of the Piechowskis' home and the boat landing where Ms. Piechowski's assailant left her at about the same time. When he was picked up, Saecker was approximately 1.9 miles east of the Piechowskis' house and approximately 3.2 miles north and east by road from the boat landing where Ms. Piechowski had been left by her assailant. (Map; Trial Tr. (Stephan testimony; Schwartz testimony; Saecker testimony))

14. If Saecker had been Ms. Piechowski's attacker, it is physically possible, but very unlikely, that he would have been able to travel the distance from the boat landing where Ms. Piechowski was left by her assailant to the wayside 3.2 miles away, where he was given a ride, in the time available between the end of the kidnapping and his being picked up. (Inference from time and distance evidence)

15. Gerald Stephan was the truck driver who picked up Saecker. Mr. Stephan testified that Saecker appeared agitated and that he had what appeared to be a couple dozen spots of blood on his shirt and a little bit of blood on his right hand. Stephan described the blood as being on the front of Saecker's shirt, as though splattered from throwing down a piece of meat. Stephan asked Saecker why he had blood on him, and Saecker stated first that he had cut himself and then that he had been in a fight. (Trial Tr. (Stephan testimony)) Saecker had not been in a fight that night, but had been arrested by the police the previous night.

16. Stephan took Saecker into Winona, where he dropped him off at his motel. Stephan went to the Happy Chef restaurant to have coffee (Stephan was scheduled to be in Dayton, Iowa, by 7:00 in the morning). Stephan testified that Saecker did not change his shirt. (Trial Tr. (Stephan testimony)) The waitress who served Saecker at the Happy Chef did not recall seeing blood on his shirt. (Trial Tr. (Niemann testimony)) Following Saecker's arrest, a shirt with blood on it was not located. (Trial Tr. (Proue testimony)) Saecker paid his bill at the Happy Chef with a credit card. (Trial Tr. (Niemann testimony))

17. Upon returning from Iowa, Stephan heard of the assault that had taken place early that morning. He contacted the police, who were able to locate Saecker at his motel in Winona. (Trial Tr. (Stephan testimony; Proue testimony; Long testimony))

18. Following the assault, the Piechowskis provided descriptions of Carol Piechowski's assailant. Record Document 14 is a photograph of a police line up. Saecker is the fifth man from the left. The Piechowskis' descriptions differed materially from Saecker's physical characteristics. Both Ms. Piechowski's description and Mr. Piechowski's estimate

would have placed the attacker's height at around 5 ft. 7 in. to 5 ft.10 in. Saecker is approximately 6 ft. 3 in. Ms. Piechowski described her attacker as stocky and as having a body type different from her son's, who was taller and lean. Saecker weighed approximately 175-180 pounds at the time. The police line up photo reveals that Saecker's build was not stocky, but similar to Ms. Piechowski's son.[3] Both Mr. and Ms. Piechowski described the attacker as having short, dark hair. While dark, Saecker's hair was longish at the time of his arrest. (R. 14) Ms. Piechowski testified that she did not smell any alcohol on her attacker's breath. Saecker had been drinking heavily that evening. (R. 14; Trial Tr. (C. Piechowski testimony; R. Piechowski testimony; Saecker testimony))

19. Mr. and Ms. Piechowski separately participated in a police line up, which also included having the suspects speak. Both identified the same man from the line up based on body type. This was not Saecker, but the man standing to Saecker's right in Record Document 14—the City of Alma's Police Chief. The man selected differed from Saecker in build, height and hair length. The man selected also differed from Saecker in that he wore a moustache. Deputy Proue testified, however, that Saecker had a moustache when he was arrested and that the photograph of the police line-up was recreated. (Trial Tr. (Proue testimony)) At the line up, Ms. Piechowski stated that she was sure of her selection. However, at trial, she stated that she was not sure. (Trial Tr. (C. Piechowski testimony; R. Piechowski testimony; Proue testimony); R. 14)

20. Following his arrest, Saecker was placed in the maximum-security module of the Winona County Jail. Five other inmates shared the module. Saecker's cellmates obtained a copy of the criminal complaint charging Saecker with Ms. Piechowski's kidnapping and assault. These cellmates concluded that Saecker had committed the assault and interrogated him about the crime in a manner and under circumstances that were coercive. Saecker made statements that were somewhat bizarre and potentially incriminating. These included the statement that he was becoming sexually aroused by the reading of the charges, that "it was better than jacking off" and that the "bitch deserved it." However, Saecker never made any statement that either directly admitted having committed the crime or provided details consistent with his having committed the crime. Saecker's cellmates testified that he denied committing the crime. Saecker also told his cellmates that his roommate at the El Rancho Motel was a twelve year-old boy, which was not true. Saecker indicated by his statements to his cellmates that he believed that he was picked up by Stephan the night prior to the assault, not the same night as the assault. Saecker described running through the swamp when he was arrested the night prior to the assault. He did not indicate that he had been in the swamp with a woman. (Trial Tr. (Krieger testimony; Ronnenberg testimony; Dennis testimony; Shaneyfelt testimony; Braun testimony; Lince testimony; Saecker testimony))

[3] Ms. Piechowski did not believe her attacker wore glasses. (Trial Tr. 83, 93) Saecker had glasses with him that night and was wearing them when Stephan picked him up. However, he testified that his glasses were non-prescription and that he took them on and off. (Trial Tr. at 343)

21. About two weeks before trial Saecker told a jailer, "I figured it out; I raped the girl, but she liked it." Very shortly before trial, he showed another jailer a piece of paper with a Bible reference on it and stated, "That's why I raped her, that's why we're guilty." The Bible reference was Matthew 5:28 – Whosoever looketh on a woman to lust after her hath committed adultery already in his heart. (Trial Tr. (Cherry testimony; Birtzer testimony; Saecker testimony))

22. While confined prior to trial, Saecker suffered from untreated paranoid schizophrenia. Saecker's situation in jail of having inmates questioning him, of being presented with a criminal complaint accusing him of committing a sexual assault, and of being under the influence of alcohol were sufficient to cause the type of pressure or stress resulting in rapid disorganization and manifestation of symptoms of paranoid schizophrenia. During his examination on December 1, 1989, by psychologist Paul Caillier, Saecker exhibited the following criteria of paranoid schizophrenia having a direct bearing on the reliability of his statements to his cellmates and jailers: disturbance in thought content, disturbance in form of thought and disturbance of sense of self. These criteria are explained in Dr. Caillier's affidavit. (Suppl. Submission, Ex. 7)

23. Saecker has maintained his innocence since his arrest, although his denials of guilt have reflected the fact that his recollection has been clouded by the effects of alcohol and marijuana use and by his mental illness. (Hearing Tr. (Saecker testimony)

24. Following Saecker's conviction, further tests were performed on articles of physical evidence from the crime. Pubic hairs were tested by the FBI, which reported that they were consistent with Ms. Piechowski's hairs, but not Saecker's. (R. 26) DNA testing was performed on a stained area of Ms. Piechowski's underpants. Initially, the tests showed the sample to be inconsistent with Saecker's DNA, but also with Ms. Piechowski's. A second set of tests was performed on a cutting from Ms. Piechowski's underpants and on a vaginal swab taken at the time of the assault. These found the DNA samples to be consistent with Ms. Piechowski's DNA, but not with Saecker's. (Post-Conviction Mot. Tr. (Deguglielmo testimony); R. 22-24)

25. The second round of DNA testing appeared to indicate the presence of DNA from a second male, which showed up very faintly. Ms. Piechowski testified that she had not had intercourse with her husband (or any other man) since 1981. Dr. Deguglielmo could not explain the presence of these two apparent sources of male DNA. However, neither of the two types of male DNA were consistent with Mr. Saecker's DNA. (Trial Tr. (C. Piechowski testimony); Post-Conviction Mot. Tr. (Deguglielmo testimony); R. 23 and 24) The state did not call any witness to dispute Dr. Deguglielmo's conclusions.

26. Prior to trial, Saecker's attorney, William Thorie, discussed with Saecker the option of doing DNA testing, taking into account the expense, local availability, questionable legal recognition and particularly the delay in trial that would result from aggressively pursuing DNA testing. Based on these discussions, Saecker decided not to further pursue this possible avenue of defense. (R. 19)

27. Saecker may have acted inappropriately at times during the trial. For example, he may have called the prosecutor a "bald-headed jerk" during closing argument on the insanity phase of the trial. (*See* Trial Tr. at 497) The parties have not provided specific citations to the record of Saecker acting inappropriately. There is no evidence in the record that such actions caused the jury to decide the case other than on the basis of the evidence admitted during the trial. To the extent Saecker acted inappropriately during the trial, such behavior was likely due, in substantial part, to his having an untreated mental illness while confronted by a high stress social situation.

28. There is no evidence that Saecker knowingly withheld evidence at the time of his trial which was potentially exculpatory.

29. There is no evidence that Saecker knowingly provided false information at the time of his trial which was potentially incriminating.

CONCLUSIONS OF LAW

1. Wisconsin Stat. § 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 is considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172(2).

2. The evidence in this case is clear and convincing that Fredric Saecker was innocent of the crimes for which he was imprisoned.

3. Fredric Saecker did not contribute to bring about his conviction by his act or failure to act, within the meaning of Wis. Stat. § 775.05(4).

4. Pursuant to Wis. Stat. § 775.05(4), the amount of $25,000 will equitably compensate Frederic Saecker for his imprisonment.

5. Further proceedings are required to determine the amount to which petitioner may be entitled for attorney fees, costs and disbursements.

DISCUSSION

In the findings of fact, I have attempted to set out the objective evidence. In this section, I explain my reasons for regarding this evidence as clearly and convincingly establishing Saecker's innocence.

If the DNA evidence is excluded as providing evidence of neither guilt nor innocence—and the state makes no claim that the DNA evidence is in any way incriminating—then there is no physical evidence connecting Saecker with the crime. As the state points out, the one possible exception is the blood that Mr. Stephan observed on Saecker's shirt and hand when he picked him up early in the morning of the 28th. There is no corroborating evidence that Saecker had blood on his hand or shirt when he was picked up. Even if he did have blood on him, there is no evidence that the blood was in some way connected to the crime. The fact that a shirt with blood splattered on it was never located and the fact that the waitress from the Happy Chef did not see the blood suggest that Mr. Stephan's observation may have been faulty, possibly due to his observing Saecker at night while driving a truck. During argument, the parties suggested—although I could not find in the record where it was established—that Saecker changed his clothes at the El Rancho before going to the restaurant. If true, this could explain why no one else saw blood on Saecker's shirt. But it would also undermine the credibility of Stephan's powers of observation, since he testified that Saecker was wearing the same clothes in the Happy Chef.

Aside from this, there is no physical evidence connecting Saecker to the crime.

At the same time, there is no identification evidence connecting Saecker to the crime. The descriptions provided by both Mr. and Ms. Piechowski were not consistent with Saecker's physical appearance—he was significantly taller and thinner than the man the Piechowski's described and had longer hair. Both Ms. Piechowski and her husband picked out the same man, who was not Saecker, during the police line up.

Because the crime ended at the boat landing near the bridge to Winona, it would make sense that the assailant would attempt to cross into Winona either over the bridge or, if a swimmer like Saecker (*See* Trial Tr. (Saecker testimony)), by swimming across the Mississippi

River. It is difficult to understand why, if Saecker was the attacker, he would head back in the direction of the Piechowskis' house, go two miles further east and then turn around to head back in the direction of their home.

Had Saecker made such a trip, he would have had to hide to avoid being seen by the police. There is nothing in either Mr. Stephan's or Mr. Schwartz's account to suggest that Saecker was acting furtively.

The time and place that Saecker was picked up by Mr. Stephan is difficult to reconcile with Saecker's being the assailant. The absolute earliest that the crime could have ended would have been about 1:05 a.m.

In determining when the crime ended, I use the fact that the distance from my home to office is 1.4 miles. I am almost as tall as Saecker. On a good day, walking at a brisk pace, it takes slightly more than 20 minutes to walk this distance. This is in daylight, on clear, dry sidewalks, without stops. Since Mr. Piechowski called the police at 12:39, Ms. Piechowski and her assailant would have left the Piechowskis' home at roughly 12:35 a.m. The assailant was holding Ms. Piechowski by the throat from behind, forcing her to walk ahead of him at a quick pace, but not running. (Trial Tr. (C. Piechowski testimony)) He sexually assaulted her twice. When cars passed, the two ducked down to avoid being seen. It is virtually impossible that the two could have covered 1.3 miles under these circumstances in less than 30 minutes. It is more likely that the crime lasted at least ten minutes longer.

I have some difficulty accepting Mr. Schwartz' and Mr. Stephan's recollections that Saecker was picked up by Stephan between 12:45 a.m. at the earliest (Schwartz) and 1:20 a.m. at the latest (Stephan). The reason is that Stephan recalled seeing a woman in the ditch near the bridge to Winona, who he believed had been in an accident. (Trial Tr. (Stephan testimony)) Given that there was no evidence confirming that an accident had occurred, the coincidence of Stephan's seeing a woman in the ditch near the place where Ms. Piechowski had been left by her attacker causes me to believe that this was Ms. Piechowski. Mr. Stephan explained that he was unable to stop for the woman he saw, but that he reported the accident to the police in Winona after he crossed the bridge. The Buffalo County Sheriff's Department received a call from the Winona Police Department regarding a possible accident at 1:52 a.m.[4] (Trial Tr. (Brantner testimony)) This would suggest that Stephan and Saecker passed Ms. Piechowski possibly as early as 1:40 a.m. They would have only driven 3.2 miles—the distance from the wayside where Saecker was picked up to the boat landing where Ms. Piechowski was left by her attacker. I do not know the speed limit on Highway 35/54. If it were as low as 25 miles per hour, it would have taken Stephan about seven and half minutes to drive from the wayside where he picked Saecker up to the where he spotted Ms. Piechowski. This would put the time of Stephan's giving

[4] The first Court of Appeals decision indicates that Ms. Piechowski was walking along the highway when she was spotted by a sheriff's officer at approximately 1:52 a.m. (R5:2) I could not find support for this fact in the record provided by the parties. Given that Ms Piechowski had walked nearly 1.3 miles when she was picked up, if she was spotted at 1:52 a.m., then she would have left the boat landing around 1:30 a.m. This would render the time of Stephan's spotting her in the ditch more consistent with his estimate of picking Saecker up around 1:15 a.m.-1:20 a.m.

Saecker a ride at about 1:32 a.m. If the woman Stephan saw was Ms. Piechowski, Saecker might have been picked up as late as 1:40 a.m.

At the same time, if Ms. Piechowski was the woman in the ditch, she was still in roughly the same location as where her attacker had left her. If Saecker was the attacker, he had to have traveled 3.2 miles to the wayside where Stephan picked him up while Ms. Piechowski remained near the boat landing. This would be physically possible if the assault ended at 1:05 a.m., Ms. Piechowski stayed at the boat landing another twenty-five minutes and Saecker ran, rode a bicycle or got a ride from another car to the wayside. This physical possibility is unlikely. There is no evidence of Saecker's having a bicycle and no evidence that he got a ride. If he did get a ride, it is coincidental that he was given a ride only as far as the Four Mile Club. It does not make sense that if he got a ride going east he would immediately turn around and start walking west, back towards Winona. There is also no evidence to suggest that Saecker had been running when Stephan picked him. If he had been running, he would have traveled 3.2 miles, going past the crime scene, without being observed by anyone. As with the theory that Saecker got a ride to the wayside, it is difficult to explain his running that distance only to turn around to walk back in the direction of the Piechowskis' home.

Rather than indicating guilt, the place where Saecker was picked up by Stephan is exactly where one would expect to find him, had he just left the Four Mile Club as he claimed and was in the process of walking home—that is, he would have traveled about a quarter of a mile from the bar. Both Saecker and Budnick, the bartender, claim that Saecker was at the Four Mile Club at the time of the crime.

That Saecker did not have any money when he left the Four Mile Club is also corroborative of his alibi. Had he been Ms. Piechowski's attacker, he would have had little time to spend the money he had taken out in Winona. The fact that he spent his funds is corroborated by his needing to walk or hitchhike back to Winona and by his using a credit card to pay for his order at the Happy Chef.

Virtually the entirety of the evidence of Saecker's guilt comes from his words and actions in the first hours and days after the crime and from two statements made to his jailers shortly before trial. The former include his appearing agitated to Mr. Stephan, his telling Stephan that the reason he had blood on him was that he had been in a fight, and his statements to his cellmates in response to their interrogation. Saecker's behavior and statements were consistent with his untreated mental illness, coupled with his having been drinking for several days. Saecker's explanation of the blood on his shirt and hand (if in fact blood was on either) was similar to his confusion about when he was picked up by Stephan in relation to the crime. When he spoke with his cellmates, Saecker evinced the belief that he was picked up by Stephan one day prior to the crime. This belief was consistent with his innocence, since in reality the two events occurred within minutes of each other. Dr. Caillier's explanation regarding a schizophrenic's disintegration of thought and speech during stress is consistent with Saecker's statements to his cellmates. None of the statements can be regarded as an unqualified admission of guilt. All of the statements have the quality of being inappropriate and are suggestive of mental illness. A person who is professing his innocence with respect to a sexual assault would not openly state that hearing the description of the crime was sexually arousing or "better than

jacking off." Aside from these statements, which were given under coercive conditions, according to Saecker's cellmates, he denied committing the crime.

Saecker's statements to his jailers are similarly suggestive of mental illness, in particular the reference to universal sin based on Matthew 5:28 in his comment to Deputy Birtzer. As Dr. Caillier explained, this is the kind of compromise "do no harm" statement schizophrenics make. In this statement, Saecker was able to admit guilt (in that everyone is guilty); while simultaneously maintaining his innocence (he was not unique in being guilty). Dr. Caillier testified that he was "least comfortable with" Saecker's statement that he had figured it out, he had raped the girl, but she liked it, in terms of its consistency with the speech of paranoid schizophrenics. (*See* Post-Trial Mot. Tr. at 198) Nevertheless, as to this statement, Dr. Caillier explained that schizophrenics take external stimuli and internal stimuli and mix them together and produce a third product which in a large percentage of instances is devoid of reality. (*Id.* at 199) The statement that one has "figured out" why one committed a crime—particularly where what has been figured out is as offensive and lacking in insight as the belief that the victim "liked it"--is suggestive of mental illness.

Because they are virtually the only evidence of Saecker's guilt, and because he consistently denied having committed the crime long after his conviction even though this meant he could not be eligible for parole, Saecker's statements at most create some doubt as to his innocence. They do not prevent the record, considered as a whole, from clearly and convincingly establishing that Saecker was not the assailant.

In both its brief and at oral argument, the state points out that a jury convicted Saecker on the evidence that I have recounted. This argument justifiably gives one pause before concluding that Saecker was innocent. It does not, however, dispel my belief that he was. The jury did not, in fact, consider precisely the same evidence. It did not hear Dr. Caillier's explanation of the thought and speech patterns of paranoid schizophrenics during the first phase of the trial. The ATM withdrawal evidence, the testimony of the Four Mile's bartender and the testimony of cab driver Lovas were not presented. An expert for the state gave evidence based on blood type and the physical examination of pubic hairs which suggested Saecker could have been the assailant. (Trial Tr (Culhane testimony)) Even if the jury had considered the identical evidence to what I have summarized, its finding of guilt has been vacated. This Board is required to make an independent determination of Saecker's guilt. The state's argument fails to address the logic of Saecker's argument or the evidence supporting a finding of innocence. I find it to be fundamentally unpersuasive for that reason.

But in addition to the foregoing is the DNA evidence, which until now I have treated as probative of either guilt or innocence. During oral argument, District Attorney Duvall stated that if I believed Dr. Deguglielmo, I should find in favor of Mr. Saecker. I do believe Dr. Deguglielmo, and find his testimony confirms Saecker's innocence.

The problem with the DNA results is that the first test identified the person contributing the female DNA fraction as someone other than Ms. Piechowski. Ms. Piechowski was almost certainly the person contributing female DNA recovered from her underpants. Even if another woman had worn the same underpants, some of the DNA should have been consistent with Ms.

Piechowski's. This failure to match up the crime sample DNA with that of the victim rendered the first test results meaningless, and Dr. Deguglielmo in fact disregarded the results.

This was not, however, the extent of the testing. A second sample was taken whose female fraction's DNA was found consistent with Ms. Piechowski's. The male fraction's DNA was not consistent with Saecker's. Of interest is that the male DNA was consistent with that found during the first round of testing. Because there is a very low probability of this happening randomly, this suggests that the first test used and reported the correct male fraction, but somehow incorrectly analyzed or reported the female fraction.

The state argues that the very small amount of DNA from another male detected in the vaginal sample analyzed in the second test undermines the usefulness and credibility of the second set of results. The state did not attempt to impeach the results of the second DNA testing through expert testimony, and no expert witness testified in support of this conjecture. Moreover, whatever the reason for the second male DNA in the vaginal swab, it was still not Saecker's.

The only other potential impeachment of Genetic Designs' second set of tests comes from the fact that the first set of results demonstrated that an error could occur. The suggestion would seem to be that a single error is sufficient to call into doubt the results of all other tests. There is no record evidence in support of this view. Dr. Degulglielmo testified that the kind of error found with respect to the first set of tests was a very low probability event. It is very unlikely that the same error would have occurred a second time during the second set of tests. There is also no evidence of testing error with respect to the second test. The female fraction's DNA and the victim's were consistent. The male fraction DNA from the second sample was consistent with the male fraction DNA from the first sample.

The other factual question in the case is whether Saecker contributed to his conviction. Saecker was undoubtedly less than the ideal defendant. His testimony at trial, particularly on cross-examination, is not easy to follow and appears consistent with Dr. Caillier's explanation of paranoid schizophrenic thought processes and speech. Saecker may not have always behaved well in the presence of the jury when not testifying, but this too is consistent with the manifestations of untreated mental illness under conditions of substantial stress. Saecker's statements to his cellmates and to his jailers are similarly symptomatic of his illness. In all these respects, I agree with Saecker that the reference in Wis. Stat § 775.05 to a defendant's contributing to his conviction is not intended to deny compensation to a mentally ill individual who manifests symptoms of his illness.

Aside from this symptomology, there is Saecker's decision not to have DNA testing performed. This was a case-strategic decision made upon the advice of counsel. I do not believe the statute is properly read to preclude compensation in cases where the defendant makes reasonable decisions of case strategy, relying principally on the advice and expertise of his or her attorney, but where in hindsight, a particular strategy decision turns out to have been mistaken.

As set out in the findings of fact, there is no evidence of Saecker knowingly withholding exculpatory evidence or creating false, incriminating evidence. Accordingly, I do not find that Saecker contributed to his conviction by his action or inaction, within the meaning of Wis. Stat. § 775.05(4).

With respect to the issue of compensation, Saecker's attorney has indicated that he seeks the statutory maximum. The state does not argue that a lesser amount is warranted. Saecker served roughly six years by the time of the court of appeals' mandate affirming the trial court's new trial grant. His time served after that would appear to have been in the nature of pre-trial detention, which does not appear compensable under the statute. In this case, the maximum compensation available is the statutory maximum of $25,000. I agree with Saecker that he should be awarded this amount.

A final issue is the amount of petitioner's entitlement to attorney's fees, costs and disbursements. Saecker's Supplemental Submission of September 13, 1999, itemizes fees through that date. This submission has not been supplemented for subsequent work. Moreover, neither party has addressed the appropriateness of awarding fees in their briefs.

Section 775.05(4) does not establish a specific procedure for a claimant to request fees. The procedure contained in Wis. Stat. § 227.485(5) is adequate, although, of course, this does not mean that the statute provides the standard for deciding whether to award fees. Petitioner is directed to file an accounting and claim for fees, costs and disbursements within thirty days of the service of this decision. This submission should comply with the requirements of § 227.485(5) and present any argument regarding the standard for determining petitioner's entitlement to fees. The state is directed to file any objections to petitioner's claim within 15 working days of service of petitioner's submissions. The parties may choose to stipulate as to petitioner's claim for fees and costs.

With respect to objections to this proposed decision, *see* Wis. Stat. 227.46(2), I will adopt the same timetable, but reverse the order of presentation. Any party adversely affected by the proposed decision shall serve and file its objections within thirty days after service of the decision. Responses to objections should be filed within fifteen working days of service of the objections. As part of his response to the state's objections, petitioner should include an itemized statement of additional fees or costs incurred in responding to the objections.

PROPOSED DECISION AND ORDER

For the reasons set forth above, IT IS ORDERED that petitioner Fredric Saecker be paid the amount of TWENTY-FIVE THOUSAND DOLLARS in compensation for his having been convicted while innocent of the crimes averred in Buffalo County Circuit Court Case Nos. 89-CF-33 and 89-CF-36. IT IS FURTHER ORDERED that petitioner's entitlement to attorney's fees, costs and disbursements be determined in accordance with the procedure established in this decision.

Dated at Madison, Wisconsin on July 2, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____

Peter C. Anderson
Administrative Law Judge

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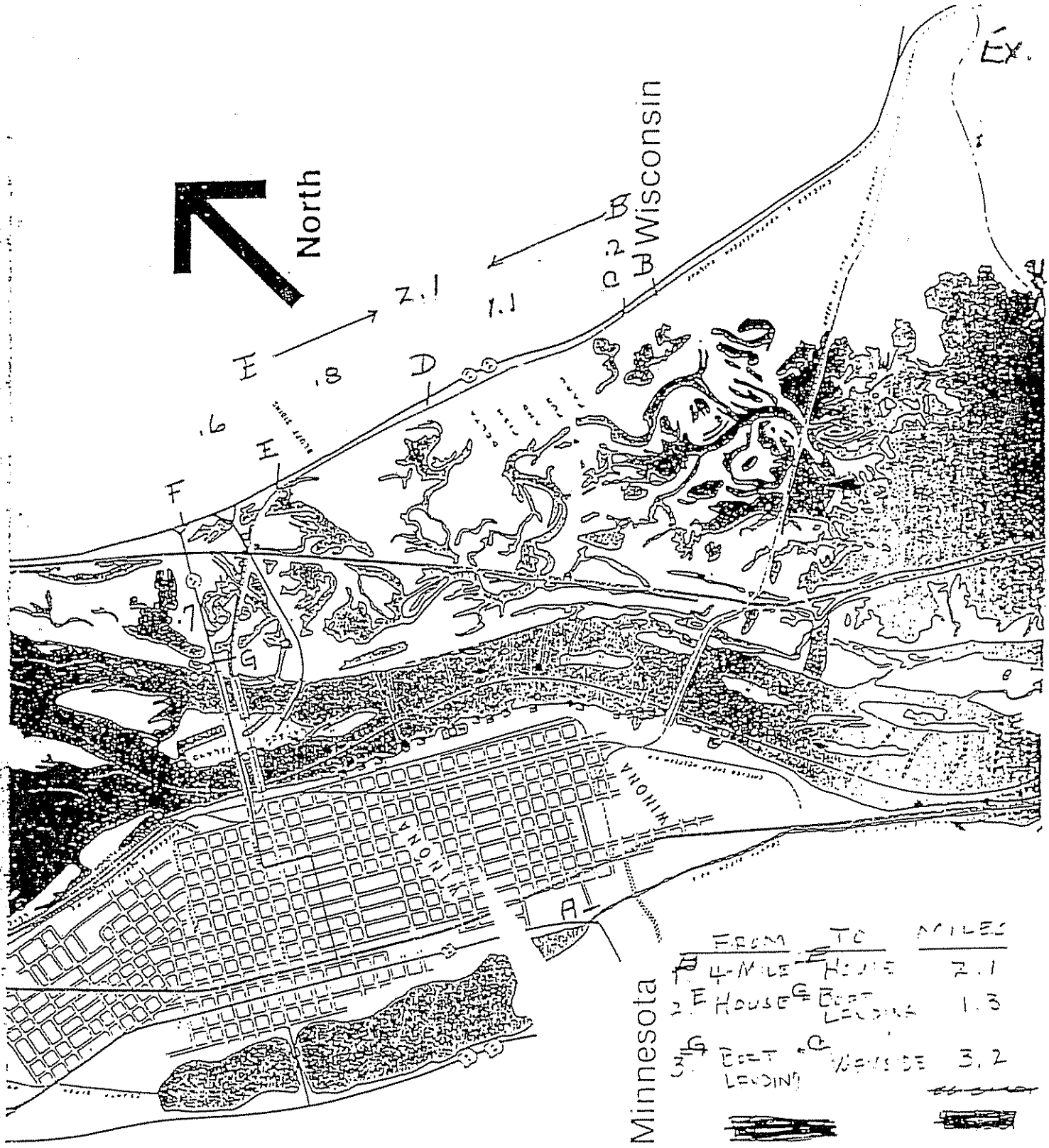
Ex. 5



FROM	TO	MILES
A	4-MILE HOUSE	2.1
E	HOUSE & PORT LANDING	1.3
C	WAYSIDE & PORT LANDING	3.2

	MILES	
A = FAST BANK	6.3	TO B
B = 4-MILE HOUSE	.2	TO C
C = WAYSIDE	1.1	TO D
D = TAVERN-COTTONWOOD INN	.8	TO E
E = HOUSE	.6	TO F
F = CORNER H-54, H 35	.7	TO G
G = PORT LANDING		

Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Claim of

Fredric Saecker

Case No. CB-01-0004

PROPOSED DECISION ON THE AWARD OF ATTORNEYS FEES AND COSTS

In a proposed decision dated July 2, 2002, I ruled that petitioner Frederic Saecker had established by clear and convincing evidence that he was innocent of the crimes for which he had been convicted in Buffalo County Circuit Court Case Nos. 89-CF-33 and 89-CF-36. With respect to Saecker's claim for attorneys fees, I noted that his last fee statement had been submitted on September 13, 1999, and that neither party had addressed the appropriateness of awarding fees in their briefs. I noted that Wis. Stat. § 775.05(4) does not establish a specific procedure for a claimant to request fees and stated that "the procedure contained in Wis. Stat. § 227.485(5) is adequate, although, of course, this does not mean that the statute provides the standard for deciding whether to award fees." (Proposed Decision at 14) Accordingly, I did not rule that Wis. Stat. § 277.485 provided the standard for deciding whether to award fees or that the state's position in these proceedings had not been substantially justified. Petitioner was directed to file an accounting and claim for fees, costs and disbursements that complied with the requirements of § 227.485(5) and to present any argument regarding the standard for determining his entitlement to fees. The state was directed to file objections to petitioner's claim for fees and costs. I advised the parties that they could stipulate to petitioner's claim for fees and costs.

Buffalo County District Attorney Duvall did not object to my ruling in favor of Saecker on the question of his innocence, but did object to attorneys fees being awarded under Wis. Stat. § 227.485(3). At roughly the same time, Attorney McKenzie submitted a statement of fees and costs indicating that he had spent (by my calculation) 155.25 hours on the case, as well as $1,471.60 in costs and disbursements (the submission actually read "$1,4171.60," but this was plainly in error), that his current billable rate was $200 per hour, and that his total bill for fees and costs was $30,456.60. Mr. McKenzie subsequently filed a stipulation signed by District Attorney Duvall providing that "[p]ursuant to Wis. Stat. § 227.485(3), the Petitioner is entitled to recover the attorney fees and costs reasonably and necessarily incurred in connection with the contested case." The parties went on to stipulate that $20,000 would be an appropriate award for reasonable fees and costs.

Despite my invitation to parties to stipulate to petitioner's fee claim, upon my review of their stipulation, I was not certain that I could accept their agreement to petitioner's entitlement to fees under Wis. Stat. § 227.485(3). It was not clear to me that the Buffalo County District Attorney's Office was properly regarded as a "state agency" for purposes of this statute. I also

expressed doubt as to District Attorney Duvall's authority either to decide the amount of fees that should be awarded in this case or to determine that fees should be awarded pursuant to Wis. Stat. § 227.485. My general expectation was that Saecker's attorneys fee claim would be paid, if at all, by the state, acting through the Claims Board and the Wisconsin Legislature, *see* Wis. Stat. § 20.505(4)(d).

Because of my uncertainty regarding these issues, I asked the parties to advise me whether, in the event the Board awarded the stipulated amount of attorneys fees and costs, this amount would be paid by or charged to the Buffalo County District Attorney's Office or properly charged against an appropriation other than Wis. Stat. § 20.505(4)(d), and if so, which appropriation. I also asked that the petitioner identify the legal basis for his claim for fees, in the event the Buffalo County District Attorney's Office would not be charged for the award. As part of this submission, petitioner was asked to identify the standard for determining the appropriateness of awarding fees, as well as the amount of fees and costs to be awarded.

District Attorney Duvall responded that the claim was filed before the Claims Board against the State of Wisconsin under Wis. Stat. § 775.08 and not against Buffalo County. Mr. Duvall explained that he participated in the case as representing the state's interests at the request of the Attorney General's Office because of his prior knowledge of the matter. Mr. Duvall went on to clarify that he did not presume to have the authority to bind the Board regarding the amount of fees that should be awarded or regarding the decision whether fees should be awarded. Mr. Duval stated that the decision whether to award fees rested solely in the Board's jurisdiction. Finally, Mr. Duvall explained that he had objected to petitioner's original billing of $30,000 as not being reasonable in amount, but that if the Board decided to award fees, he was not objecting to the reasonableness of Saecker's billing for fees and costs if reduced to $20,000.

In responding to my request for additional information regarding his fee claim, Saecker first argued that his recovery of fees and attorneys fees should be in addition to the compensation awarded to him for his years spent in prison. Saecker next argued that his claim constituted a contested case proceeding under Wis. Stat. § 227.42, that the Claims Board was a "state agency" for purpose of § 227.485, that he was the prevailing party in these proceedings, and that "[t]he Claims Board was not substantially justified in opposing compensation to Mr. Saecker." (Petitioner's Submission on Fees and Costs at 3) Saecker then argued that Attorney Duvall had already stipulated to his entitlement to fees and costs, agreeing for the state that it lacked substantial justification for its opposition to his claim. According to petitioner, the Board invited Mr. Duvall to make counter submissions "and then to represent the Claims Board in a contested hearing in opposition to the petition." (*Id.* at 4) Saecker therefore asserted that "[t]here cannot be any doubt as to Mr. Duvall's function in this case. Mr. Duvall was representing the Claims Board and he was acting as the Claims Board's attorney." (*Id.*) At the same time, petitioner clarified that he did not regard the Buffalo County District Attorney's Office as the state agency contesting his claim, but the Claims Board, and that he was not asking that fees be paid by the Buffalo County District Attorney's Office. In response to my inquiry, petitioner identified Wis. Stat. § 20.865(1)(a) as the appropriation from which his fees and costs would be paid. In response to my final question, based on his belief that fees should be awarded under § 227.485, petitioner identified the criteria set out in Wis. Stat. § 814.245(5) as providing the standard for determining the amount of fees and costs to be awarded.

FINDINGS OF FACT

1. The parties have stipulated that $20,000 represents a reasonable award of Fredrick Saecker's attorneys fees and costs.

2. The parties' stipulation is not properly interpreted as an agreement on the part of the state that its opposition to petitioner's claim was not substantially justified.

3. Petitioner's attorney has submitted a statement indicating that he expended 45 hours on petitioner's claim in 1999. (Suppl. Submission, p. 10)

4. Using the Bureau of Labor Statistics Inflation Calculator, $75 in 1985 is equivalent to $116.12 in 1999. Multiplying this amount times 45 hours yields $5,225.40.

5. Petitioner's attorney has submitted a statement indicating that he expended 8 hours on petitioner's claim in 2000. (Petitioner's Statement of Fees and Costs (herein, Petitioner's Statement))

6. Using the Bureau of Labor Statistics Inflation Calculator, $75 in 1985 is equivalent to $120.03 in 2000. Multiplying this amount times 8 yields $960.24.

7. Petitioner's attorney has submitted a statement indicating that he expended 6 hours on petitioner's claim in 2001. (Petitioner's Statement)

8. Using the Bureau of Labor Statistics Inflation Calculator, $75 in 1985 is equivalent to $123.44 in 2001. Multiplying this amount times 6 hours yields $760.64.

9. Petitioner's attorney has submitted a statement indicating that he expended 96.25 hours on petitioner's claim in 2002. (Petitioner's Statement; Oct. 22, 2002, e-mail from Attorney McKenzie)

10. Using the Bureau of Labor Statistics Inflation Calculator, $75 in 1985 is equivalent to $126.16 in 2002. Multiplying this amount times 96.25 hours yields $12,142.90.

11. The sum of the number of hours reported by Saecker's attorney for 1999-2002 times an inflation-adjusted rate of $75 per hour for each year equals $19,089.18.

12. Petitioner's attorney has submitted a statement indicating that $1471.60 in costs were incurred in the presentation of petitioner's claim. Of this amount, $478.00 is shown as the cost of a transcript of petitioner's deposition taken in his malpractice lawsuit, while another $424.00 is shown as the cost of the transcript of the deposition of petitioner's criminal trial attorney taken in petitioner's malpractice lawsuit.

CONCLUSIONS OF LAW

1. Buffalo County District Attorney did not represent the Claims Board in these proceedings, but the State of Wisconsin.

2. Fredrick Saecker is not entitled to recover attorneys fees and costs under Wis. Stat. § 227.485.

3. Fredrick Saecker is entitled to recover attorneys fees and costs under Wis. Stat. § 775.05(4).

4. The stipulated amount of $20,000 represents a reasonable amount of attorneys fees and costs incurred by Fredrick Saecker in this case. Saecker should be awarded this amount in addition to the compensation paid to him for having been convicted in Case Nos. 89-CF-33 and 89-CF-36 of crimes for which he was innocent.

DISCUSSION

Two issues are raised by Saecker's request for attorneys fees and costs: whether his fees and costs are recoverable and, if they are, the amount that should be awarded.

I would not have ruled that the position taken by the state in these proceedings was not substantially justified, within the meaning of Wis. Stat. § 227.485. The state had previously obtained a conviction under an evidentiary standard requiring proof beyond a reasonable doubt. Although I found Saecker was innocent under a clear and convincing standard, this required sorting through a great deal of evidence, some of which was equivocal. Two key parts of the evidentiary puzzle requiring close analysis were the time line evidence and the DNA evidence. Still tending to indicate guilt were Saecker's statements after he was arrested and the blood that Gerald Stephan testified seeing on Saecker's shirt when he gave him a ride into Winona. One of Saecker's statements—that he raped the girl, but she liked it—was particularly consistent with his having committed the crime and was the statement that his own expert, Dr. Caillier, was "least comfortable with." Finally, while I believe Saecker was not Ms. Piechowski's assailant, this conclusion means that there was a second man wandering along Highway 35/54 in the early hours of June 28, 1989. In this case, I did not have difficulty concluding that it was more likely than not that Saecker was innocent—the preponderance of evidence standard. On the other hand, I would have found it difficult to rule that he had demonstrated his innocence beyond a reasonable doubt. The intermediate finding of innocence by clear and convincing evidence was in no way a foregone conclusion; a small change in the quantum of evidence might have resulted in the rejection of the claim.

Saecker argues that by stipulating to the award of fees under Wis. Stat. § 227.485, District Attorney Duvall has agreed that the state's position in this case was not substantially justified.

My initial reaction to the stipulation was similar. However, upon careful consideration of the matter, I do not believe this is a fair interpretation of Mr. Duvall's stipulation. Mr. Duvall expressly disputed a finding that the state's position was not substantially justified in his objection to the proposed decision. In his response to my request for further submissions on the fee issue, Mr. Duvall has reasonably explained that he viewed Saecker's original fee submission of over $30,000 to be excessive, but that he felt an award of $20,000 was reasonable and appropriate. I believe what happened is that Mr. Duvall incorrectly interpreted the proposed decision as ruling that Saecker was entitled to fees under § 227.485. Consistent with that understanding, Mr. Duvall was merely attempting to establish the amount of fees to be awarded when he entered into the stipulation proposed by Attorney McKenzie.

Even if Mr. Duvall had intended to stipulate that the state's position in this case was not substantially justified, the question would remain, against which "state agency," within the meaning of § 227.485, should fees be awarded.

Saecker makes clear that he is not seeking fees against the Buffalo County District Attorney's Office. Mr. Duvall makes clear in his submission that he appeared in this case on behalf of the state and at the request of the Attorney General's Office. Section 227.485 authorizes the recovery of fees in a contested cases in which the position of a "state agency" is not found to have been substantially justified. While the term, "state agency" is not defined in Wis. Stat. § 227.485, it cannot be reasonably interpreted to mean the state itself. This is consistent with the appropriations definition cited by Saecker, Wis. Stat. § 20.001(1), under which "state agency" is defined to mean any office, department or independent agency in the executive branch of Wisconsin state government, the legislature and the courts.

In arguing that fees that can be awarded under § 227.485, Saecker asserts that District Attorney Duvall acted as the Claims Board's attorney.

This is incorrect. District Attorney Duvall appeared for the state as the party opposing compensation for petitioner. Although participation by the state is not established in § 775.05, neither is it prohibited. Section 775.05(2) requires that a copy of an innocent convict claim be transmitted to the prosecutor who prosecuted the petitioner. Saecker never objected to District Attorney Duvall's appearance in the case. In this case, the Division of Hearings and Appeals, and not Mr. Duvall, served as the agent of the Board, acting as its hearing officer.

Although Saecker claims fees under § 227.485 against the Claims Board, the only position that the Claims Board has taken in this case, so far consisting of a proposed decision of its appointed hearing examiner, is to rule in petitioner's favor. Saecker cannot argue that the Claims Board was not substantially justified in adopting the position he was himself advancing. Nor can the Claims Board, which acts as an adjudicative body, be characterized as the losing party in the very proceedings that it has adjudicated.

Accordingly, fees are not recoverable under Wis. Stat. § 227.485.

Although fees are not recoverable under § 227.485, Wis. Stat. § 775.05(4) provides that if the Board determines that the petitioner was innocent of the crime for which he was convicted,

the awarded compensation "shall include any amount to which the board finds the petitioner is entitled for attorney fees, costs and disbursements." Whether the statute authorizes the award of fees in this case primarily involves a question of statutory construction.

> The purpose of statutory interpretation is to discern the intent of the legislature. . . To do so, we first consider the language of the statute. If the language of the statute clearly and unambiguously sets forth the legislative intent, we apply that intent to the case at hand and do not look beyond the statutory language to ascertain its meaning. . .
>
> ....
>
> [A] statute is not rendered ambiguous merely because the parties disagree as to its meaning. . . If a stature is ambiguous, we look to the scope, history, context, subject matter, and object of the statute in order to ascertain legislative intent.

State v. Setagord, 211 Wis. 2d 397, 406, 565 N.W. 2d 506 (1997) (citations omitted).

I find § 775.05(4) to be ambiguous. The statute's reference to a petitioner's entitlement to fees could mean that the Board may award fees if authorized by some other statute, such as Wis. Stat. 227.485 or 42 U.S.C. § 1988. Alternatively, the statute can be read as conferring on the Board the discretion to determine the amount of fees and costs that will fairly compensate a claimant who succeeds in demonstrating his or her innocence.

Neither of the parties has identified legislative or historical materials bearing on the meaning of § 775.05(4)'s attorneys fee language. I have also not located such materials. Nor have I found case law interpreting this provision.

I believe that in enacting § 775.05(4), the Legislature intended to confer on the Claims Board the discretion to determine an amount that would fairly compensate a person who has been falsely convicted of a crime for his or her reasonable attorneys fees. I also believe that the Legislature intended that this amount be in addition to the amount awarded to compensate a claimant for his or her imprisonment.

The language of the statute denotes the exercise of discretion. Moreover, the Board is instructed that attorneys fees and costs are to be "included" in the petitioner's compensation. If the statute were interpreted as requiring an innocent convict to pay his attorney out of the amount paid to compensate him for his imprisonment, fees would not be included in the awarded compensation, but subtracted from it. To require a claimant's fees to be paid from his or her compensation award could easily leave the claimant without any award at all, since compensation is capped at $5,000 for each year of imprisonment and $25,000 overall. There is also little reason for the Legislature to direct the Board to determine the amount of a claimant's attorney fees, if the amount is to be paid from the award. The claimant and the attorney are capable of establishing this sum by private agreement.

The possibility that the Legislature intended fees to be awarded only if another statutory basis is present is not a reasonable construction of § 775.05(4). If another statute already entitles

the petitioner to fees and costs, there is no reason for § 775.05(4)'s fee provision, and this part of the statute would be superfluous.

The only two candidates for a petitioner's claiming fees that I am aware of are the two statutes already alluded to—the federal Civil Rights Attorneys Fee Statute, 42 U.S.C. § 1988, and Wisconsin's Equal Access to Justice Act, Wis. Stat. § 227.485.

Of these two statutes, § 227.485 was not in existence when § 775.05(4) was enacted. Accordingly, the award of fees under the state statute could not have been in the Legislature's contemplation. Even if § 227.485 had been in existence, the same problem that Saecker faces here would preclude the award of fees in a case before the Board. The Claims Board serves as an adjudicative or quasi-adjudicative body. If the Board rules in favor of a petitioner in an administrative proceeding—the predicate to a fee award under § 227.485—then the petitioner cannot claim that the Board's position was not substantially justified. Nor can the Board be regarded as the losing party to administrative proceedings that it has itself adjudicated and adjudicated in favor of the claimant.

For similar reasons, it is not reasonable to ascribe to the Legislature an intent that fees be awarded under § 775.05(4) only if recoverable under 42 U.S.C. § 1988. Section 1988 fees are recoverable by a prevailing civil rights plaintiff. In the appropriate case, § 1988 fees would be potentially recoverable by a person falsely convicted of a crime who claimed that his conviction resulted from a violation of his civil rights. But fees are recoverable under 42 U.S.C. § 1988 in civil actions, not in administrative proceedings, such as one before the Claims Board. In addition, § 775.05 establishes a no-fault system of compensation for innocent convicts. It is not relevant to the determination of innocence—the only issue that needs to be answered under the statute—whether the conviction in some way violated the claimant's civil rights. Because § 1988 fees would not be recoverable on a § 775.05 claim, the Legislature's purpose could not have been to authorize the Claims Board to award fees only if recoverable under the federal attorneys fee statute.

Having determined that the Claims Board has the discretion to award Saecker his fees and costs under Wis. Stat. § 775.05(4), I further find that Board should exercise its discretion to do so in this case. As Saecker persuasively argues, because of his mental illness, he could not have successfully brought this claim without counsel. Regardless of Saecker's schizophrenia, the case required the piecing together of a good deal of evidence, some of which, as noted above, was equivocal. As I have ruled, the statute is properly read as creating a right to the award of fees which is in addition to the amount paid to compensate a claimant for his or her imprisonment. In this case, I have proposed paying Saecker the statutory maximum of $25,000. If his attorney were to be paid $20,000 from this amount, petitioner would be left with $5,000 as compensation for spending more than five years in confinement. This would not fairly compensate him.

Unlike § 227.485, which incorporates the criteria of Wis. Stat. § 814.245(5), § 775.05(4) does not identify specific standards for determining the amount of a fee award. In this case, I find that the parties' stipulation provides a reasonable sum.

Attorney Duvall has capably represented the state in these proceedings. I believe he can be entrusted with the question of the amount of fees that should be awarded, in the event they are determined to be recoverable. Moreover, I agree with the parties that $20,000 represents a reasonable award of fees and costs in this case.

Like Mr. Duvall, I viewed the original fee claim as high. While Attorney McKenzie performed yeoman-like service on behalf of his client, I did not find the quality of work to be so high as to justify a rate of $200 per hour. Saecker's brief contained several misstatements of fact[1] and often did not provide citations to the record. These two factors required an extensive and intensive independent review of the record on my part. Having performed that review, I also know how much time it takes to search for and thoroughly read the relevant portions of the transcripts, review all of the witness statements, consider all of the submitted exhibits, read the parties' briefs and claim submissions, attend the conferences and hearing and draft the proposed decision. These activities took me approximately 30 hours—approximately 26 hours, not counting travel. By my calculation, Mr. McKenzie is claiming 169.25 hours, or more than five times my total, of which 14 are for travel. His submission following the proposed decision also initially billed travel time at $200 per hour. The original submission also sought fees for discovery taken in Saecker's civil case, a cost that I would not attribute to the instant claim or hold recoverable under either § 775.05(4) or § 814.245.

In contrast, the stipulated amount is quite close to the amount that would be recoverable employing the standards of § 814.245. The starting point for determining the amount of attorneys fees under § 814.245(5)(a)2. is $75 per hour, indexed for inflation since the enactment of the Equal Access to Justice Act in November 1985. *Stern v. DHFS*, 222 Wis. 2d 521, 588 N.W.2d 658 (Ct. App. 1998). While a more exact calculation could be done using monthly Consumer Price Indices were a breakdown of Saecker's fee submission by month available, as a test of reasonableness, I used the Inflation Calculator from the Bureau of Labor Statistics' website to adjust § 814.245's $75 per hour to 1999, 2000, 2001 and 2002 levels. As set out in the findings of fact, this yielded a total of $19,089.18 in fees for the four years. Although some of the hours might be discounted, Saecker makes the point that an EAJA award can be increased to reflect the contingent nature of the recovery and the inability to find a local lawyer willing to take the case, although the latter point is asserted rather than demonstrated. Added to Saecker's fee recovery would be his costs, excluding the costs of the two deposition transcripts. Using § 814.245(5)'s criteria as a benchmark, the $20,000 stipulated by the parties represents a reasonable recovery.

[1]For example, Mr. McKenzie argued that Saecker did not have a moustache, whereas the man who was selected in the police line-up had one. The record revealed that Saecker had a moustache when he was arrested, but that he had shaved it prior to the recreation of the line-up when it was photographed. As another example, Saecker's attorney asserted that Saecker told his cellmates in the Winona County Jail that he had been arrested for having sex with a twelve year-old boy. The record revealed that Saecker had only stated that a twelve year-old boy was his roommate at the El Rancho Motel

PROPOSED DECISION AND ORDER

For the reasons set forth above, IT IS ORDERED that petitioner Fredrick Saecker be awarded twenty thousand dollars ($20,000) in attorneys fees and costs, to be paid in addition to the compensation paid to petitioner for his having been convicted of crimes for which he was innocent.

Dated at Madison, Wisconsin on October 22, 2002.

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By: Peter C Anderson

Peter C. Anderson
Administrative Law Judge

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