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STATE OF WISCONSIN CLAIMS BOARD

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CLAIM OF: MICHAEL L. WINSTON

CLAIM NO. 2018-047-CONV

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Notice of Appeal Rights

This is a final decision of the Wisconsin Claims Board.

Any person aggrieved by this decision has a right to petition for judicial review in circuit court as provided in Wis. Stat. §§ 227.52 and 227.53. Any petition must be filed in court and served on the Board within 30 days of service of the decision. The time to file and serve a petition runs from the date the final decision is mailed. The petition shall name the Wisconsin Claims Board as the respondent.

Any person aggrieved may also file a petition for rehearing with the Board under Wis. Stat. § 227.49(1); that petition must be received by the Board within 20 days of the service of this decision.

This notice of appeal rights is provided pursuant to Wis. Stat. § 227.48.

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DECISION

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The Claims Board considered this matter on August 22, 2019. Claimant Michael L. Winston did not request a hearing. The Claims Board reviewed written materials submitted by Winston and the Milwaukee District Attorney's Office.

Background

This is a claim for Innocent Convict compensation pursuant to Wis. Stat. § 775.05. The claim relates to Winston's 2013 conviction for Attempted Homicide, Kidnapping, Robbery, and Reckless Injury as Party to a Crime. Winston states he is innocent of this crime. He requests the maximum reimbursement of \$25,000 for the six years and three months he spent in prison plus an additional \$250,000 for pain and suffering.

### Claimant's Facts and Argument

Winston was charged with Attempted Homicide and other charges relating to an incident at 6:25 p.m. on May 29, 2012, when Tory Mason was robbed and shot by three men who then forced Mason into a vehicle. A bystander called police, who found the vehicle. The three individuals fled the scene and left Mason in the vehicle. Police apprehended one of the suspects after a chase. Winston alleges he is innocent and had no involvement in this crime.

Winston states that shortly after 3 p.m. on May 29, 2012, he met with a former girlfriend, Natasha Rodefer. Winston got into Rodefer's vehicle and they spoke for approximately 20 minutes. Another vehicle pulled up and Winston spoke briefly with two individuals in the vehicle, one of whom was Winston's brother, Terrance Rowe. Winston and Rodefer then picked up food and went to Rodefer's house, where they remained until approximately 7 p.m. at which time Winston received a call from his brother and left. Winston notes that his attorney never called Rodefer as an alibi witness and asserts the attorney was later disciplined for this failure.

Winston states that even though witnesses all testified that three individuals were involved in the crime, and three suspects were apprehended within 48 hours of the incident, police arrested him 6 days later. He alleges that the only evidence against him was Mason's identification of Winston in a photo array, which took place right before Mason went into surgery and therefore was not reliable. Winston also notes that one of the perpetrators of the crime, Terrance Rowe, testified that Winston was not there and was not involved. Winston also alleges that video from an area gas station proves he was not there. Winston believes the police and prosecutors knew Mason was not truthful and that Winston was innocent and not involved in the crime.

In November 2017, the court ordered a new trial and the state dismissed the charges against Winston in September 2018.

### DA's Response and Argument

The Milwaukee District Attorney's Office (DA) does not take a position as to whether or not Winston should be compensated; however, the DA does not believe he was wrongfully convicted.

The DA denies that Winston's assertions that the only evidence against him was Mason's identification of his photo, that this identification was suspect, and that the state knew Winston was innocent. The DA notes that the state had no reason to believe Mason was untruthful in his description of the crime. He made statements against his own penal interest, his statements were consistent throughout several

interviews, and he declined to claim property as his own, which he could have falsely done if he wanted to strengthen his claim against the suspects. Furthermore, many of the details he provided were corroborated by other evidence. Mason identified a photograph of Winston as the person who shot him and tried to pull a black mask over his head. The victim's identification of Winston was corroborated by the fact that the vehicle used in the crime was under Winston's control at the time of the incident. The DA also notes that although one of the codefendants minimized Winston's involvement in the shooting, he stated that Winston knowingly provided the car used in the robbery and was therefore party to the crimes committed.

The DA notes that, although Winston is correct that the court found his attorney's performance deficient because she did not call his alibi witness, that was not the basis of the disciplinary proceeding against her.

Finally, the DA points to the fact that the only reason the charges against Winston were dismissed was because the state was not able to locate Mason at the time a new trial was ordered. Because Mason's testimony was critical to the case, the DA was not able to proceed with a new trial.

#### Discussion and Conclusion

Under the standards of Wis. Stat. § 775.05(3), the Claims Board must determine whether or not the evidence is clear and convincing that the petitioner was innocent of the crime for which he was imprisoned.

In this case, the victim specifically identified Winston as the person who shot him, attempted to blindfold him, and forced him into a vehicle that was under Winston's control at the time of the incident. Many of the details provided by the victim were corroborated, including the use of the vehicle and the witness's description of the attempted blindfolding. Further, Winston's assertion that video surveillance from a gas station establishes that he was not at the gas station before the robbery is not exculpatory. As noted by the DA, it is not clear what specific areas were covered by the camera(s) or where the victim was relative to that coverage.

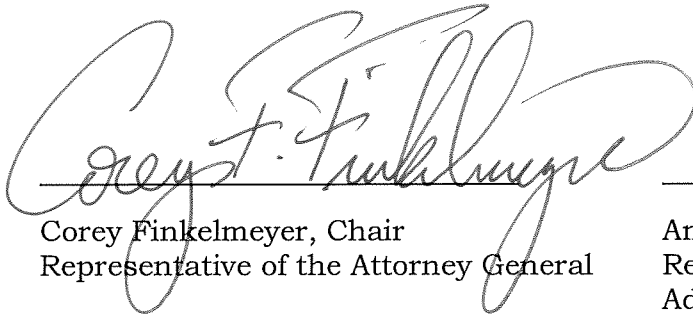
While the State must prove guilt beyond a reasonable doubt, a claimant like Winston must prove his innocence by clear and convincing evidence. These are two very distinct standards with different burdens of proof and cannot be conflated. Here, the case was ultimately dismissed not on the grounds of innocence, but rather because the State was unable to locate the victim for the retrial.

In addition, the failure of Winston's attorney to call an alibi witness does not automatically lead to a conclusion that Winston is innocent, particularly in light of the other evidence presented. Further, Winston's assertion that the failure to call the alibi witness was the reason for the attorney's disciplinary proceeding is incorrect. See

*Office of Lawyer Regulation v. Caspari (In re Disciplinary Proceedings Against Caspari)*,  
371 Wis. 2d 567, 882 N.W.2d 852 (2016).

Based on the above, the Board concludes and finds that the evidence is not clear and convincing that Winston was innocent of the charges discussed herein. Accordingly, the Board further concludes that no compensation shall be awarded. Vote: 4-0

Dated at Madison, Wisconsin this 9<sup>th</sup> day of October, 2019



Corey Finkelmeyer, Chair  
Representative of the Attorney General



Amy Kasper, Secretary  
Representative of the Secretary of  
Administration



Luther Olsen  
Senate Finance Committee



Ryan Nilsestuen  
Representative of the Governor