May 27, 2020

Montana Law & Justice Interim Committee
PO BOX 201706 Helena, MT 59620-1706
(406) 444-3064

Re: Montana’s Proposed Compensation bill for the wrongfully convicted.

Dear Members of Montana’s Law & Justice Interim Committee:

I write to provide hopefully helpful information to the legislators from the State of Montana as they consider passage of their own legislation to provide compensation for those who have been wrongfully convicted. I am a civil-rights attorney and partner at the law firm of Loevy & Loevy, where I specialize in civil representation of people who have been wrongfully convicted and subsequently exonerated. Over the past nearly 8 years, I have represented dozens of wrongfully convicted individuals in federal litigation under 42 U.S.C. § 1983, and have also represented exonerees in state compensation proceedings in Illinois, which has long had a compensation statute, Washington State, which passed the Wrongly Convicted Person’s Act in 2013, and in Nevada, which just passed a statute last year.

There are many reasons the State Legislature should create a compensation regime that is entirely separate from any other tort remedies an exonerated person might have.

Without a doubt, one of the most vexing state compensation statutes I have litigated under is Washington State’s, and particularly RCW 4.100.080, which uses language that, depending on the interpretation, may require exonerees to forego pursuing vindication of their constitutional rights in order to seek compensation—both monetary and non-monetary—from the State of Washington. The State of Montana would do well to avoid adopting something like this provision and, would do well to simply provide that state compensation proceedings have no res judicata value (like Illinois has done, 735 ILCS 5/2-702) or by simply creating an offset so that the State does not pay the same person twice (as Nevada has done, NRS 41.960).

A statute like Washington’s has led to perverse outcomes as well as onerous, costly, and lengthy litigation about the constitutionality of the provision itself. Cases include:

- **Robert Larson, Tyler W. Gassman, & Paul Statler v. State of Washington.** In Larson, there was extensive litigation—including a trial and two separate appeals—concerning whether three exonerees could obtain compensation under the WCPA. Due to ambiguities in the law, Larson, Gassman, and Statler were required to simultaneously litigate both the reach and legality of RCW 4.100.080, with two entirely different sets of attorneys, in both federal and state court. In state court, through two appeals over six years, Larson, Gassman, and Statler raised constitutional issues about RCW 4.100.080, including whether asking an exoneree to forego pursuing totally separate compensation was unlawful under two areas of federal law; namely, (1) as an “unconstitutional condition,” asking an exoneree to forego their constitutional rights, and (2) whether any agreement of this nature is constitutional under Newton v. Rumery, 480 U.S. 386 (1987).
• **Donovan Allen v. State of Washington.** In *Allen*, Donovan Allen spent more than 15 years wrongfully convicted for a murder he did not commit and was exonerated by DNA testing that linked to a perpetrator later charged with the crime. After he was released, Mr. Allen was able to resolve potential § 1983 claims without litigation, but has spent more than a year-and-a-half litigating his claim under the WCPA, including through hearings and now an appeal.

• **Doris Green and Meredith Town v. State of Washington.** Both Green and Town were wrongfully convicted, exonerated, and settled §1983 suits long before the WCPA was passed. Both Green and Town settled their § 1983 suits without the involvement of the State and, of course, without the opportunity to even consider state compensation. Among other things, given the language in RCW 4.100.080, there is now a legal question about whether their prior settlements preclude compensation under the state statute, including raising important due process concerns as well as significant constitutional issues if the statute is interpreted to preclude relief for exonerees who could have never sought WCPA relief, as opposed to another tort remedy, in the first place.

These are just examples and there are many other ways in which the WCPA in Washington has, in some ways, created more problems than it has solved. Should any additional information be needed or helpful, I would be honored to be asked to provide it.

Sincerely,

David B. Owens