

Order

Michigan Supreme Court
Lansing, Michigan

December 22, 2022

Elizabeth T. Clement,
Chief Justice

163354

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

CHARLES DALE PERRY, JR.,
Plaintiff-Appellant,

v

SC: 163354
COA: 351469
Ct of Claims: 2018-000096-MZ

STATE OF MICHIGAN,
Defendant-Appellee.

On December 8, 2022, the Court heard oral argument on the application for leave to appeal the June 3, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

MCCORMACK, J. (*concurring*).

With reluctance, I concur in the Court's decision to deny leave to appeal. In *Tomasik v State*, 505 Mich 956 (2020) (MCCORMACK, C.J., concurring), I explained that the statutory language in the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq.*, does not appear to allow for compensation for a plaintiff who has established innocence by new evidence but who obtained relief from their criminal convictions for some other reason (for Mr. Perry, prosecutorial misconduct and ineffective assistance of counsel for not objecting to the prosecutorial misconduct).

I still think so. And I am still deeply troubled by what that means in cases like these. A criminal defendant who can establish that new evidence (1) demonstrates that they didn't commit the crime, (2) results in the reversal or vacation of their convictions, and (3) results in an acquittal at retrial or dismissal of all charges can obtain compensation under the WICA. Yet a criminal defendant who establishes the first and the last of those elements—and could have established the second as well if that were the only issue in their appeal—is excluded if an *additional* error resulted in the reversal or vacation of their conviction. Take this case: the Court of Appeals reversed and ordered a new trial based on prosecutorial misconduct and ineffective assistance for failure to object to that misconduct. For that reason, the panel declined to address the claim that new evidence required a new trial. Yet that new evidence demonstrated innocence and resulted in an acquittal on all charges at retrial, and likely would have resulted in the reversal of the convictions but for the reversal on other grounds.

The purpose of the WICA is to repair some of the harm done to the wrongfully convicted. *Ricks v State*, 507 Mich 387, 402 (2021). Why would the Legislature exclude those wrongfully convicted who suffered *additional* wrong(s) (by their lawyer, the prosecutor, the trial judge, the police)?

It would be slightly less disconcerting if this example were rare. But I suspect the opposite is true. Wrongful convictions are almost always the result of multiple system failures—an ineffective lawyer, evidence withheld by police or prosecutors, junk science, a trial court reluctant to gatekeep effectively. When systems fail, errors occur; some of those errors map neatly onto legal claims about new evidence of innocence but often failing systems produce other errors that are unrelated to new evidence. Just look at this case and *Tomasik*. Mr. Perry and Mr. Tomasik were certainly not *less* wrongfully incarcerated than those eligible for compensation under the WICA.

The WICA is still a new statute. And many statutes need tweaks after they get some road testing. In *Tomasik* I asked the Legislature to “consider whether it intended to exclude individuals such as the plaintiff—call them ‘new evidence plus-ers’—from the WICA.” *Tomasik*, 506 Mich at 957 (MCCORMACK, C.J., concurring). Had it done so, Mr. Perry wouldn’t be here. Three hundred thousand dollars would not make Mr. Perry whole, to be sure. But the news that he doesn’t qualify for even that small gesture at repairing the harm done to him because he suffered legal error in addition to the undiscovered evidence of his innocence is a rule of decision I would be hard pressed to justify. Keep the bad luck coming, I guess.

I don’t like administering legal rules that I can’t explain to the people they impact. Please fix it, legislators.

CAVANAGH, J., joins the statement of MCCORMACK, J.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 22, 2022

Clerk