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6 **BEFORE THE VICTIM COMPENSATION BOARD**  
7 **OF THE STATE OF CALIFORNIA**  
8

9 In the Matter of the Claim of:

**Proposed Decision  
(Penal Code § 4900 et seq.)**

10 **Joel Alcox**

11 Claim Number: 16-ECO-03

12 **INTRODUCTION**

13 Joel Alcox (Alcox) submitted his claim for compensation as an erroneously convicted person  
14 on August 2, 2016. Alcox was represented by Robert Sanger, Esq., and the California Department of  
15 Justice, Office of the Attorney General (AG) was represented by Deputy Attorney General Nick Fogg.  
16 Andrea Konstad was assigned to hear this matter by the Executive Officer of the California Victim  
17 Compensation Board (CalVCB).

18 On March 10, 2017, the AG submitted his response to the claim and conceded that Alcox had  
19 established his innocence by a preponderance of the evidence. Because the AG stated his Office  
20 would not be introducing any evidence in opposition to Alcox's claim, the parties agreed to have the  
21 matter decided on the written record.

22 On June 1, 2017, the Hearing Officer requested additional briefing.

23 The parties submitted additional briefing and the record closed on June 16, 2017.

24 Alcox was convicted of murder on May 8, 1986. In seeking compensation as an erroneously  
25 convicted person, he bears the burden of proving by a preponderance of the evidence he is innocent of  
26 that crime. Alcox has failed to prove by a preponderance of the evidence he is innocent of the charged  
27 offense and does not have a finding of factual innocence; consequently, the Hearing Officer  
28 recommends that his claim for compensation be denied.

1 **PROCEDURAL HISTORY**

2 **I. Arrest and Conviction**

3 On March 25, 1986, Alcox was arrested for the murder of Thakorbhai Magain Patel (Patel).  
4 Alcox’s co-defendant, Richard Lothery (Lothery), was also arrested for the crime and the two were  
5 prosecuted in separate trials. Lothery was convicted and his conviction was affirmed on appeal with  
6 modifications.

7 On May 8, 1987, a jury convicted Alcox of one count of first degree murder, in violation of Penal  
8 Code section 187 (count I);<sup>1</sup> one count of robbery, in violation of section 211 (count II); and one count  
9 of first degree burglary, in violation of section 459 (count III). The jury also found true as to each count  
10 the allegation that he was armed with a firearm during the commission of the offense, within the  
11 meaning of section 12022, subdivision (a). The trial court sentenced Alcox to an aggregate term of 26  
12 years-to-life.

13 **II. Facts Surrounding the Murder**

14 On February 16, 1986, Patel was alone in the living quarters at the motel he ran - the Lompoc  
15 Motel (motel). At approximately 6:40 p.m., motel guests heard three to five gunshots followed by  
16 someone yelling, “Whoa, whoa, whoa,” or “Wow, wow, wow.” Eugene Wieggers (Wieggers), who was  
17 staying on the first floor of the two-story motel, heard someone banging on his door but did not open it  
18 out of fear for his safety. John Hermans (Hermans) was staying on the second floor of the motel. He  
19 ran out of his room and found Patel slumped against the doorway to Wieggers’s room with blood on his  
20 chest. Hermans asked Patel who had inflicted the injury and Patel repeatedly said a word that  
21 sounded like “Sanjo.” Hermans returned to his room and called 911. When Hermans returned to the  
22 location where he had found Patel, Patel was no longer there. Police, paramedics, and firefighters  
23 arrived and, after a brief search, found Patel lying on the floor of his living quarters. Patel was still  
24 alive.

25 When the first responders spoke to Patel, he was able to provide his name and age, and the  
26 name of his doctor. He was also able to affirmatively indicate he had been shot and knew the identity

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28 <sup>1</sup> All further statutory references will be to the Penal Code unless otherwise indicated.

1 of his assailant. When the first responders asked who the shooter was, Patel repeatedly said a word  
2 they had trouble understanding.<sup>2</sup> According to the statements of those who were able to hear Patel,  
3 the word sounded like “sanjo,” “sirgernol,” “ajar bolhemar,” “haraj mavar,” “sergenal,” or “singji.” Patel  
4 was taken to the hospital where he subsequently passed away from a gunshot wound to his chest. In  
5 addition to the chest wound, Patel had been struck by a bullet that pierced his wrist and entered his  
6 face above the lip, breaking his jaw. Given the alignment of these injuries, it appeared he had raised  
7 his arm to protect his face.

8 Police at the scene noted that a counter separated the public’s side of the motel’s office from  
9 the Patel family’s living quarters. The lift-up portion of the counter was raised to allow access through  
10 the counter and the nearby drawer in which the money was kept was open. The drawer had not been  
11 emptied of its contents and Patel’s son told police he had no way to determine whether any money  
12 had been stolen. A \$5 bill was lying on the floor just inside the living quarters. The door leading into  
13 the motel’s office from the outside had a bell hanging from it to alert the Patels of new arrivals.

14 In addition to the two bullets found in Patel’s body, police recovered a third bullet from a display  
15 case in the motel’s office that appeared to have been fired from inside the living quarters. Given the  
16 trajectory of the holes made by this bullet, which went through a couch and the wall behind the couch  
17 that divided the living quarters from the office, Crime Scene Investigator Henry Weigel (Investigator  
18 Weigel) concluded the bullet had been fired at a downward angle. Powder burns on Patel’s sleeve  
19 and gunshot residue on his right hand indicated the gun had been fired at very close range. The  
20 murder weapon was never recovered and George Levine (Levine), a Criminalist from the Department  
21 of Justice, stated he was unable to determine the type of weapon used or whether all of the bullets had  
22 been fired from the same gun; however, it appeared that all of the bullets recovered were the same  
23 size - .38 caliber.<sup>3</sup> The only fingerprints found at the scene belonged to Patel and his son who was out  
24

25 <sup>2</sup> Although Patel spoke English, his native language was Gujarati, an Indian dialect. The Patel family  
26 spoke Gujarati around the home and Patel spoke with an accent. Adding to the difficulty in  
27 understanding his speech, Patel’s jaw was broken, he was in severe pain, and he wore an oxygen  
28 mask. In the background, the television was playing loudly.

<sup>3</sup> No casings were found at the scene.

1 of town when the shooting occurred. Based on blood patterns and the trajectory of the bullets, Levin  
2 concluded that the shots were fired inside the living room area of the Patel's living quarters.<sup>4</sup> Smoke  
3 smudge on Patel's shirt cuff indicated the shot was fired at close range – within 18 inches.<sup>5</sup>

4 During the chaos that followed the shooting, a crowd had gathered in front of the motel. Two  
5 teenagers who were present in the crowd told police they spoke with an individual named Lothery who  
6 told them someone had been shot. Other witnesses also reported seeing Lothery at the scene  
7 immediately following the shooting. Nobody reported seeing Alcox, or any other potential suspect,  
8 near the Lompoc Motel on the night of the murder and there was no physical evidence connecting  
9 Alcox, Lothery, or anyone else with the crime.

### 10 **III. Preliminary Hearing and Pre-Trial Motions**

11 At Alcox's preliminary hearing, defense counsel, Kenneth Biely, Esq. (Biely), asserted that  
12 Alcox's confession was coerced.<sup>6</sup> The municipal court disagreed. Biely then raised the issue again at  
13 the superior court level on a section 995 motion.<sup>7</sup> He made the same arguments, submitted briefing  
14 on the matter, and referred the superior court to the preliminary hearing transcripts.<sup>8</sup> After reviewing  
15 the tape of Alcox's interrogation and the preliminary hearing transcripts, and considering the  
16 arguments presented by the two attorneys, the superior court judge found beyond a reasonable doubt  
17 that the confession was free and voluntary.

### 18 **IV. Trial**

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20 <sup>4</sup> AG's Exhibit 57, at pp. 1591, 1664.

21 <sup>5</sup> AG's Exhibit 57, at pp. 1596, 1608, 1610. At Lothery's trial, Investigator Weigel testified that based on  
22 the rapidity of the shots, and the entry and exit points of the bullet through the wall separating the living  
23 quarters from the office, Patel was either seated on the couch or crouched near the couch when he was  
24 shot. (AG's Exhibit 50, at p. 497.)

25 <sup>6</sup> See AG's Exhibit 56, at pp. 1246-1247.

26 <sup>7</sup> A section 995 motion is a motion to set aside all or part of the information - the charging document in  
27 the superior court. The motion, in which the defendant contends there are insufficient legal grounds to  
28 hold him to answer on the charges, is essentially an appeal of the preliminary hearing judge's decision  
to set the case for trial.

<sup>8</sup> AG's Exhibit, 56, at pp. 1246-1247.

1 The prosecution's evidence against Alcox consisted of three things: 1) his confession; 2) an  
2 incriminating statement he allegedly made approximately two weeks after the murder, as testified to by  
3 Caroline Gonzales (Gonzales); and 3) statements he made to Lothery during conversations through  
4 the jail's vents.

5 A. Crime scene – motel's office<sup>9</sup>

6 The motel's office was very small, approximately eight and one-half feet by 11 feet.<sup>10</sup> It had a  
7 door leading in from the outside in the southwest corner of the office and a door that led into the Patel  
8 family's living quarters in the opposite, northeast corner of the room. A cowbell-style bell hung from the  
9 top of the door leading into the office from the outside that would ring when customers entered. A  
10 counter ran parallel to the east wall and separated the customer's area of the office from the  
11 employee's area. A set of cabinets were located at the back wall behind the counter. One side of the  
12 counter abutted the south wall of the office and the other end abutted the north wall, the wall that  
13 separated the office from the Patel family's living quarters.<sup>11</sup> At this latter meeting of the counter and  
14 wall near the living quarters, there was a pass-through area of the counter that allowed access to the  
15 back area of the counter and the immediately adjoining entrance to the family's living quarters.<sup>12</sup> The  
16 pass-through consisted of two pieces – the lift up piece on top and the swinging gate beneath it. The  
17 space between the counter and the back wall was extremely narrow – approximately 26-27 inches.<sup>13</sup>  
18 Investigator Weigel testified that the narrowness of this area would have made it difficult for two people  
19 to stand behind the counter at the same time.<sup>14</sup> The cash drawer was located in approximately the

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21 <sup>9</sup> Because neither of the parties provided a photograph of the motel's office, the description is based on  
22 a compilation of the drawing law enforcement and Alcox made during Alcox's confession; the "police  
23 diagram" provided as AG's Exhibit 80; and the testimony of Paul Patel (the victim's son), Kenneth Kelly  
(first responder), Sergeant Harry Heidt (Sergeant Heidt), and Investigator Weigel.

24 <sup>10</sup> AG's Exhibit 57, at p. 1571.

25 <sup>11</sup> There was at least one other door that led into the building from the outside - in the kitchen.

26 <sup>12</sup> AG's Exhibit 57, at p. 1544.

27 <sup>13</sup> AG's Exhibits 57, at p. 1571, and 80.

28 <sup>14</sup> (AG's Exhibit 57, at p. 1601.)

1 middle of the counter. To get to the cash drawer from the customer's side of the counter, one would  
2 have to walk through the pass-through portion of the counter and pass by the entrance to the living  
3 quarters before reaching the cash drawer.

4 B. Alcox's confession – introduced by Sergeant Heidt<sup>15</sup>

5 Alcox was brought in for questioning by police on March 23, 1986.<sup>16</sup> He ultimately confessed  
6 to the murder and repeated his description of the crime multiple times. Specifically, he stated that on  
7 the date of the murder, he and Lothery had been drinking at the park for several hours with two other  
8 individuals (Eric Del La Torre [De La Torre] and Randy Kasinowicz [Kasinowicz]), and that he had  
9 consumed approximately two and one-half gallons of wine.<sup>17</sup> When the group ran out of alcohol,  
10 De La Torre and Kasinowicz left. Alcox did not have enough cash to buy more alcohol, and he and  
11 Lothery decided to go in search of more money. As they were walking around near the dumpster in  
12 the alley behind the motel, Lothery showed Alcox a gun.<sup>18</sup> Alcox stated that Lothery had the gun  
13 tucked into his (Lothery's) waist band, beneath his shirt. They noticed the motel's office was empty  
14 and went inside. Although Alcox initially denied there had been any plan to rob the motel, he  
15 eventually admitted to police that "[i]t was really both of ours [ideas], it was to rob it, I just wanted to  
16 sneak back there and get some money." Alcox described the door in which he and Lothery entered  
17 the motel as well as his path out of the building. He also stated that the door to the motel's office from  
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19 <sup>15</sup> Sergeant Heidt was the sergeant in charge of detectives in Lompoc in 1986. He and District Attorney  
20 (DA) Investigator, Ken Ast (Investigator Ast) conducted the interrogation.

21 <sup>16</sup> Alcox came to law enforcement's attention following his arrest for public intoxication two days earlier.  
22 Police had received an anonymous tip that Lothery and an individual named "John Wilcox" were  
23 involved in the murder. Sergeant Heidt saw Alcox's booking photo and thought that Alcox might be  
24 "John Wilcox." When he located Alcox on the morning of March 23, 1986, Alcox was with Kenny Miller  
(Miller), and Sergeant Heidt knew that Miller and Lothery were friends.

25 <sup>17</sup> Alcox told police that he was friends with Lothery; however, he also described Lothery as a liar and a  
26 thief, and believed Lothery had stolen from him in the past.

27 <sup>18</sup> Law enforcement provided Alcox with a general drawing of the motel, alley, and dumpsters. Alcox  
28 marked the various locations he was describing on that map without police prompting, such as the  
location where Lothery had first shown him the gun, the point of entry and the path he followed to exit  
the motel.

1 the outside had a bell hanging from the top and that he put his hand on the bell to silence the noise.<sup>19</sup>  
2 He then went over to the walk-through portion of the counter that provided access to the back area  
3 where the cash drawer was located and opened the top portion of the partition while Lothery stood  
4 watch. When Investigator Ast mentioned the second, lower portion that opened by being pushed  
5 inwards, Alcox stated that the lower portion was already open when he entered the motel's office.  
6 While Alcox was reaching into the cash drawer, Patel walked into the office from the living quarters  
7 and confronted them. In his attempt to escape, Alcox pushed Patel with his forearm. While Patel was  
8 forced to step back, he did not physically re-enter the living quarters and remained in the area behind  
9 the counter. Alcox hopped over the counter and ran from the building. On his way out, he saw  
10 Lothery holding a gun in his right hand, by his side. Alcox subsequently heard two shots fired in rapid  
11 succession. From the motel, he ran back to the camper he lived in at the back of his parents' property.  
12 Thereafter, Alcox and Lothery stayed away from each other.

13 Alcox described the gun used to commit the murder as short and stubby, with a dark barrel and  
14 lighter grips.<sup>20</sup> When shown a revolver and a semi-automatic, he stated the gun had been similar to  
15 the weapon that Sergeant Heidt carried – a revolver.<sup>21</sup> When questioned as to his level of certainty  
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19 that the murder weapon resembled Sergeant Heidt's revolver, Alcox stated he was "positive."<sup>22</sup>  
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22 <sup>19</sup> In fact, a bell was located in the exact location stated by Alcox. Although police had asked whether  
the door had a bell or a buzzer, they never indicated where it might be located.

23 <sup>20</sup> The dark color of the barrel was a result of "bluing" which is a chemical method of protecting steel  
24 from rusting. (See <<https://www.arador.com/armour/bluing/>> [last accessed on July 10, 2017].)

25 <sup>21</sup> Investigator Ast displayed his weapon, as well – a semi-automatic. Neither Sergeant Heidt nor  
26 Investigator Ast told Alcox about the presence or absence of any shell casings.

27 <sup>22</sup> Criminalist Levine testified he was unable to conclusively identify either the gun or the ammunition  
28 used to kill Patel and could not determine whether all three rounds were fired from the same weapon.  
However, he also testified that two of the bullets were fired from a gun with a right-hand twist to the  
barrel and five lands and grooves. He further testified that he had test fired the gun belonging to

1 Finally, Alcox described the victim as an “old man” in his 50’s who had dark skin and  
2 resembled a “Philippino.” He further stated the victim had an average build and short hair.<sup>23</sup>

3 C. Alcox’s incriminating statement – introduced by Gonzales

4 Gonzales (then aged 15) testified that, approximately two weeks after the murder, she  
5 overheard a conversation between Alcox and Robert Garcia (Garcia) in the alleyway behind Alcox’s  
6 house. She stated Alcox was talking about the murder and told Garcia he and Lothery were “there”  
7 and that, while “they” had his fingerprints, “they” would never catch them.

8 D. Alcox’s jailhouse statements – introduced by Carol Seilhamer (Seilhamer)

9 Seilhamer was a dispatcher/jailer for the Lompoc County Jail while Alcox was incarcerated  
10 pending his trial. She overheard and recorded conversations between Alcox and Lothery while the two  
11 were in custody in different cells. At trial, she testified to portions of these conversations that appeared  
12 to indicate Alcox and Lothery had planned to commit a burglary that ultimately resulted in a murder,  
13 and that Alcox was going to repudiate his confession and present a false alibi – that he was at a party  
14 when the murder was committed. Specifically, she testified she overheard Lothery say, “We’re in a lot  
15 of trouble. You really fucked us up by making that statement to the police.” Alcox responded, “They  
16 don’t have any fingerprints and they don’t have the gun. The only evidence they have against you is  
17 my statement, and I’m going to say it was a false statement.” She further testified that Alcox told  
18 Lothery he had been allowed to speak to his father the night before. He and his father had “talked it  
19 over” and that Alcox’s friends were going to be coming to the police department the following day to  
20 tell the police he was with them at the time of the murder. Subsequently, Lothery told Alcox, “You may  
21 have to tell the police that you were by yourself that weekend,” and Alcox replied, “[n]o, my friends will  
22 say that I was with them.” When Lothery asked Alcox how that might help him [Lothery], Alcox stated,  
23

24 Lothery’s father and determined it had a right-hand twist with five lands and grooves. (The gun was  
25 entered into evidence for the People.) Because of the dirt, debris, and wearing inside the barrel, as  
26 well as the different types and weights of bullets found at the crime scene, Criminalist Levine was  
27 unable to match the bullets to Lothery’s father’s gun. However, he also testified he could not rule out  
28 the possibility that the gun was the murder weapon.

<sup>23</sup> According to the coroner’s report, Patel was 49 years old and of East Indian heritage. He weighed approximately 140 pounds, and had grey/black, medium length hair.



1 “The only evidence they have against you is my statement, and I’m going to tell them that it’s a false  
2 statement.” Lothery stated, “We’re looking at 25 years to life, and I don’t think we’re going to get out of  
3 this,” and asked Alcox what he told the police. Alcox responded, “I told them that we were outside the  
4 motel [with some undiscernible names]...and that I saw the end of the gun sticking out of your  
5 clothing.” Lothery replied, “Oh, shit.” When Lothery asked whether Alcox told the police he [Lothery]  
6 was the shooter, Alcox stated he told police he did not see anything.”<sup>24</sup>

7 E. Defense

8 Alcox was prosecuted under the felony murder rule which states that when a killing occurs  
9 during the commission or attempted commission of a felony, the person or persons responsible for the  
10 felony can be charged with murder regardless of whether there was an intent to kill.<sup>25</sup> In defending  
11 Alcox against this charge, Biely crafted a defense which essentially conceded that Alcox’s confession  
12 was correct – that he and Lothery went into the Lompoc Motel with the intent to steal and that Alcox  
13 knew Lothery was armed. However, he argued that, because Alcox ran from the motel’s office before  
14 Lothery fired the gun at Patel, he “withdrew from the conspiracy” to commit a burglary and robbery  
15 and, thus, could not be guilty of murder.

16 Alternatively, Biely argued there was reasonable doubt as to whether Lothery was the shooter  
17 and introduced evidence suggesting an individual named Sanjay Patel (Sanjay) was the shooter.<sup>26</sup>  
18 This evidence consisted of a 911 call Sanjay made on April 11, 1986, in which he appeared to confess  
19 to the murder;<sup>27</sup> the testimony of Sanjay’s then ex-girlfriend, Junia Fritz (Fritz),<sup>28</sup> who stated Sanjay

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21 <sup>24</sup> AG’s Exhibit 57, at pp. 141-142, 144. A transcript of the jailhouse conversations between Alcox and  
22 Lothery was provided by the AG (AG’s Exhibit 31); however, not all of the quoted statements are  
23 contained in that document. According to Seilhamer’s testimony, she did not have access to a tape  
24 recorder when she first overheard Lothery and Alcox talking and made written notes of their  
25 statements. Accordingly, some of her testimony was based on her written report in which she  
26 documented the conversations.

27 <sup>25</sup> *People v. Chun* (2009) 45 Cal. 4th 1172, at p. 1182.

28 <sup>26</sup> Sanjay was the 19-year-old son of Patel’s business partner and friend. Although he and the victim  
shared the same last name, they were not related.

<sup>27</sup> The transcript of the 911 is as follows:

1 brought a gun to her house on the night of the murder, asked her to clean off the fingerprints, and  
2 requested that she hide it for him; and Patel's dying words. According to counsel's argument, if Sanjay  
3 had been the shooter, Alcox was not guilty because he was "not a conspirator with that person."<sup>29</sup>  
4 However, Biely subsequently contradicted this aspect of his defense by admitting that Lothery was  
5 definitely involved.<sup>30</sup>

## 6 V. Appeal

7 Alcox appealed his conviction. Among other things, he asserted that his confession was  
8 coerced. On October 6, 1988, the California Court of Appeal, Second Appellate District (Court of  
9 Appeal) stayed sentences on counts II and III, and affirmed the judgment as modified. With respect to  
10 Alcox's assertion his confession had been coerced, the appellate court stated:

11 Although [Alcox] was detained for questioning for a lengthy period,  
12 there is no indication he was mistreated physically, that he was

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13  
14 POLICE: 911 Emergency.  
15 CALLER: Jay Patel.  
16 POLICE: Pardon me.  
17 CALLER: Jay Patel, I'm ready to go in for the murder.  
18 POLICE: You what?  
19 CALLER: I'm ready to go in for the murder.  
20 POLICE: I can't understand what your (*sic*) saying.  
21 CALLER: I'm ready to confess to murder. Lompoc Motel.  
22 POLICE: I understand Lompoc Motel. What is it you're telling me?  
23 CALLER: I'm ready to admit to the murder.  
24 POLICE: You're ready to admit to a murder?  
25 CALLER: Yea.  
26 POLICE: What's your name?  
27 CALLER: Patel.  
28 POLICE: Patel?  
29 CALLER: Junia Patel.  
30 POLICE: What, how do you spell your first name?  
CALLER: J-U-N-I-Y, 504 E. Barton, okay, bye.  
POLICE: You want an officer to come talk to you?

(AG's Exhibit 18, at pp. 100-101.)

<sup>28</sup> Fritz was Sanjay's girlfriend at the time the murder was committed.

<sup>29</sup> AG's Exhibit 59, at p. 1889.

<sup>30</sup> AG's Exhibit 59, at p. 1889.

1 deprived of comfort, that his use of alcohol the previous day so  
2 befogged his mind that he could not cogitate, or that the police used  
3 such coercive tactics as to overbear his will and to cause his  
4 statements to be involuntary. Although [Alcox] testified that he had  
5 been drinking heavily the day before, was arrested for public  
6 intoxication the night before, and was exhausted, the effects of this  
7 debauchery are not apparent on the tape. Sergeant Heidt testified  
8 that [Alcox] appeared disheveled but not intoxicated. We do not find  
9 that [Alcox's] confession was coerced.

10 (AG's Exhibit 77, at pp. 2480-2481.)

11 Alcox filed a petition for review with the California Supreme Court, which denied the petition on  
12 December 21, 1988.

## 13 **VI. State Habeas Proceedings**<sup>31</sup>

### 14 **A. 2002 state habeas petition**

15 In 2002, Alcox filed a petition for writ of habeas corpus (habeas petition) in the Superior Court of  
16 California, County of Santa Barbara (superior court) contending that he had received ineffective  
17 assistance of counsel at trial and that he was actually innocent. The superior court issued an order to  
18 show cause. After reviewing the briefing the parties submitted, the superior court denied the petition  
19 without prejudice to its renewal should admissible evidence of actual innocence warranting an  
20 evidentiary hearing become available. The superior court noted that the most significant new evidence  
21 consisted of reports of Lothery's statements suggesting that the crime was committed by himself and  
22 Sanjay; however, because the reports were unsworn and Lothery was unwilling to provide a sworn  
23 statement at that time, the superior court found that the threshold showing needed to justify an  
24 evidentiary hearing had not been made.

### 25 **B. 2003 state habeas petition and evidentiary hearing (2004)**<sup>32</sup>

26 Alcox filed a second habeas petition in 2003 that included a signed declaration from Lothery.  
27 Alcox contended he was factually innocent and had received ineffective assistance of counsel. The  
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31 Portions of the state court habeas corpus proceedings are drawn from *Alcox v. Hartley* (C.D. Cal. 2009) 614 F.Supp.2d 1064, and *Alcox v. Beard* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 176140.

32 AG's Exhibits 60-63.

1 superior court issued an order to show cause directing the parties to address the issue of whether  
2 Alcox had received ineffective assistance of counsel.

3 The state evidentiary hearing was held on November 15, 2004. Following an in-chambers  
4 discussion, the court limited the scope of the hearing to the actual innocence claim. While Alcox was  
5 precluded from introducing expert testimony regarding the reliability of the confession and ineffective  
6 assistance of counsel, he was allowed to submit a declaration from Dr. Richard Leo, an expert on  
7 reliability of confessions, to become part of the record “for future purposes.”<sup>33</sup>

8 1) Testimony

9 a) Alcox

10 Alcox testified that he did not remember where he was the night of the murder. He stated he  
11 had consumed a lot of alcohol and drugs (marijuana, cocaine, and lysergic acid diethylamide or “LSD”)  
12 during the time period surrounding the murder, and often experienced black outs which left him without  
13 any memory of what he had been doing while he was under the influence. As to what he told police  
14 during his interrogation in 1986, Alcox testified he said he was at Kelly Hughes’s (Hughes) house  
15 because he spent a lot of time there and thought it was likely he was there at the time of the murder.  
16 When questioned about his level of certainty in 1986, Alcox stated he had been sure of his  
17 whereabouts the night of the murder when he spoke with police. However, he further testified that, in  
18 light of his substance abuse during that time period, he could not really say where he had been  
19 because “one day really blurred into the next.” When asked whether he had been involved in the  
20 murder in any way, he stated he was not and that he would have remembered an event that significant.

21 With respect to his confession, Alcox testified that the night before his interrogation, he used  
22 alcohol and LSD, and did not get any sleep. When he was brought in for questioning, he was still  
23 feeling the effects of the LSD and was “speeding,” “laughing,” and beginning to feel tired. Although he  
24 was offered food and drink throughout the day, he declined to eat anything because he was not feeling  
25 hungry and felt uncomfortable. He was questioned for approximately one hour, and then given a

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27 <sup>33</sup> In 2016, Dr. Leo’s declaration was discussed in the United States District Court decision granting  
28 Alcox’s habeas petition on the ground of ineffective assistance of counsel.

1 polygraph examination for approximately two hours before being questioned again for another three  
2 and one-half hours.<sup>34</sup> Throughout the majority of the day, he repeatedly denied any involvement in the  
3 murder. By the time he confessed to the crime, he had “crashed” from the drugs, was feeling  
4 exhausted, and believed he would not be able to leave until he told police what they wanted to hear.  
5 He stated he knew what to say in making his confession because police had told him “over and over  
6 again what to say throughout the entire interrogation.” He then testified to the following details:

- 7 - He had never been inside the Lompoc Motel’s office but had been able to describe the  
8 interior based on a diagram drawn by law enforcement.
- 9 - When he identified the type of gun used to commit the murder, he simply agreed that  
10 Sergeant Heidt’s revolver looked just like it.<sup>35</sup>
- 11 - He acknowledged telling police Lothery had tucked the weapon in his pants, covered by his  
12 shirt, and had shown it to him while they were outside in the alley.<sup>36</sup>
- 13
- 14
- 15 - When law enforcement asked him whether the door to the motel’s office had a buzzer or  
16 bell, he said there was a bell.<sup>37</sup>
- 17 - When law enforcement asked whether he had dropped any money, he stated he might have  
18 because they mentioned they found a \$5 bill lying on the floor.<sup>38</sup>
- 19

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20 <sup>34</sup> Following the polygraph examination, Bruce Jackson (Jackson), the Polygraph Examiner, concluded  
21 that “Alcox was deceptive to the relevant questions.” Jackson further stated that, when he asked Alcox  
22 about his reactions to the relevant questions (e.g., “did you fire one or more shots that resulted in the  
23 death of Mr. Patel at the Lompoc Motel on February 16, 1986?”), Alcox was unable to provide an  
24 explanation and reiterated his assertion he had been at Vandenburg Air Force Base (Hughes’s house)  
25 all weekend. (AG’s Exhibit 29.)

26 <sup>35</sup> On cross examination, Alcox acknowledged that Investigator Ast had also displayed his weapon – a  
27 semi-automatic.

28 <sup>36</sup> However, Alcox subsequently acknowledged on cross examination that law enforcement did not give  
him this information.

<sup>37</sup> On cross examination, Alcox avoided the question of whether police had told him the motel had a bell  
over the door and responded that he did not know whether the bell had hung over the door. However,  
when confronted with his confession, he admitted he told police he had reached up to silence the bell.

1 Alcox further testified he told his attorney, Biely, that his confession was false and denied telling  
2 anyone other than police that he was involved in the murder. Although Biely had wanted him to testify,  
3 he refused to do so because he did not want to lie under oath by admitting the truth of his false  
4 confession.

5 With respect to the jailhouse conversations, Alcox acknowledged he and Lothery had  
6 communicated through the vents, but testified he had no knowledge they were being monitored.

7 On cross examination, Deputy DA Christie Stanley (DDA Stanley) questioned Alcox about the  
8 testimony he gave at his preliminary hearing. Alcox acknowledged that the purpose of his preliminary  
9 hearing testimony was to try to prevent the superior court from admitting his confession, that he was  
10 questioned about what had preceded his confession, and that he never asserted he had used alcohol  
11 or drugs in the 24 hours leading up to his police interview.<sup>39</sup>

12 b) Lothery

13 Lothery testified that on the afternoon of the murder, he was in the park drinking alcohol. Alcox  
14 was not with him. Somewhere between approximately 3:00 p.m. and 5:00 p.m., he met up with Sanjay  
15 and they decided to go steal some liquor. They subsequently changed their minds and went to the  
16 motel to sell the victim a drill that Sanjay was carrying in a paper bag. After they arrived at the motel,  
17 Lothery stayed near the door while Sanjay went all the way to the counter. Sanjay and Patel then  
18 engaged in an argument in a language that Lothery did not understand. Sanjay pulled a gun out of his  
19 pants, and Patel opened the cash register and threw money at him. Sanjay then pointed the gun at  
20 Patel and fired it as Patel lifted the countertop and moved toward Sanjay.<sup>40</sup> Lothery had been unaware  
21 that Sanjay was armed and was surprised to see the gun.

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22  
23 <sup>38</sup> Alcox's testimony is not entirely accurate. Law enforcement did not mention the denomination of the  
24 single bill found on the floor. Rather, they told Alcox there had been "some bills" spread around.

25 <sup>39</sup> AG's Exhibit 60, at pp. 1995-1998. On re-direct, Alcox stated that, during his preliminary hearing  
26 testimony, he was never specifically asked whether he had taken drugs or consumed alcohol just prior  
27 to his confession. He further stated he was afraid to say anything about his substance use at that time  
28 because it would have constituted a violation of his probation.

<sup>40</sup> This statement is contradicted by the physical evidence at the crime scene.

1 Following the crime, Lothery told his mother; his attorney James Voysey (Voysey); and his  
2 girlfriend, Carolyn Deroin (Deroin) the same version of the shooting.

3 With respect to the jailhouse conversations, Lothery acknowledged that he had spoken with  
4 Alcox through the jail's vents but testified he was unaware they were being tape-recorded. When  
5 questioned on cross-examination, Lothery testified he had known there was a monitor in every cell that  
6 allowed law enforcement to hear what was being said, but was unaware the conversations could be  
7 tape-recorded.<sup>41</sup>

8 Finally, Lothery admitted to giving different versions of the murder and testified he was unable to  
9 recall many of the facts surrounding the crime.

10 c) Jesus Castillo (Castillo)

11 Castillo testified he is a private investigator and was retained to work on Alcox's behalf in the  
12 habeas proceedings. When he interviewed Gonzales the first time, she told him she had been using a  
13 lot of drugs around the time she testified at Alcox's trial and that her "testimony was drug-induced and  
14 not the truth." When Castillo subsequently visited with her at her home, she told him she was unwilling  
15 to testify that her prior testimony was untrue, but was unsure whether the alleyway conversation  
16 actually occurred or was a hallucination.

17  
18  
19  
20 d) Garcia

21 Garcia testified he was 14 or 15 years old when the murder was committed and had been using  
22 alcohol and drugs (marijuana, cocaine, and LSD) on a daily basis. He repudiated Gonzales's claim that  
23 Alcox ever implicated himself in the murder; in fact, he stated he had not seen Alcox in some time.

24 e) Deroin  
25  
26

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27 <sup>41</sup> In addition, Sergeant Heidt testified that, when he arrived at the jail on the morning of March 27,  
28 1986, in response to Seilhamer's phone call about the on-going conversation, he was informed that one  
of the jailers had told Lothery that he and Alcox were being monitored.

1 Deroin testified she was Lothery's girlfriend at the time of the murder and that Lothery told her  
2 he saw Sanjay shoot Patel. On cross-examination she testified he also told her he had nothing to do  
3 with the murder.

4 f) Voysey

5 Voysey testified he had been Lothery's defense attorney. Lothery told him that he (Lothery) and  
6 Sanjay had been partying and ran out of money. They went to the motel together and Sanjay shot  
7 Patel. Throughout his representation of Lothery, Lothery always stated that Alcox was not present  
8 when the murder was committed.

9 g) Sergeant Heidt

10 Sergeant Heidt testified that Alcox was dirty and unkempt when they brought him in for  
11 questioning; however he did not smell of alcohol, did not appear to be under the influence, and never  
12 told them he was "speeding," "crashing," or too exhausted to continue. While Alcox laughed nervously  
13 throughout the interrogation and would exhibit periods of time where he either did not respond or did  
14 not respond immediately to questions, he appeared attentive and alert.

15 With respect to the jailhouse conversations, Sergeant Heidt testified there was no evidence  
16 Alcox knew the cells were being monitored; however, Lothery was aware. Sergeant Heidt opined that  
17 the conversations were staged because he believed they were self-serving. While he did not elaborate  
18 in detail as to the basis for his conclusion, he had previously testified on direct examination that he had  
19 checked the Lompoc Police Department records to determine whether Sanjay had, in fact, been in  
20 custody on March 27 and 28, 1986, the dates the recordings were made. Contrary to the  
21 representations made by Lothery and Alcox, Sergeant Heidt could find no record that Sanjay was in the  
22 jail on either of those dates.

23  
24 h) Investigator Ast

25 Investigator Ast testified he did not smell any alcohol on Alcox when they brought him in for  
26 questioning; however, Alcox was rumpled, unshaven, and had not showered.

27 i) Tracy Maniscalco (Maniscalco)



1 Maniscalco testified she was 16 years-old in 1986. Her parents operated the ambulance  
2 service and she was with them when they got the call for help. After they arrived on the scene, she  
3 assisted in caring for Patel and heard him identify the person responsible as "Sanjay." She had never  
4 been interviewed before and came forward when she saw an article in the paper reporting the suspect  
5 had been identified by a name other than "Sanjay." Maniscalco also stated she remembered seeing  
6 Lothery at the crime scene.

7 j) Jeffery Ellis (Ellis)

8 Ellis testified he is an investigator for the DA's Office. When he interviewed Gonzales in  
9 preparation for the state evidentiary hearing, she stated she had been high at the time she believed she  
10 had overheard the conversation and was concerned whether her testimony was real or imagined;  
11 however, she also stated she had not lied at Alcox's trial and had testified as to what she remembered.

12 k) Sean Hollick (Hollick)

13 Hollick had been an inmate in the Santa Barbara County Jail with Lothery and the two had  
14 shared a cell. He reiterated the testimony he gave at Alcox's and Lothery's trial - that he heard Lothery  
15 brag about being an 18-year-old murderer and heard him tell others he had shot a man in the face.  
16 Hollick further testified that when he overheard Lothery talking about the murder, the only other name  
17 Lothery mentioned was Alcox and that the man he shot was older.

18 On cross-examination, Hollick acknowledged he had subsequently told police his statement had  
19 been a lie in order to get out of testifying. Despite his reluctance to get involved, he ultimately testified  
20 at both Alcox's and Lothery's trials.

21 l) Kathy Kelly Gintz (Kelly)

22 Kelly testified that she is a paramedic and was one of the first witnesses to arrive at the scene.  
23 Although her daughter, Maniscalco, was with her, she never put that in her report in order to shield her  
24 daughter from the investigation.

25 Kelly further testified that Patel clearly stated he knew the shooter and provided a foreign-  
26 sounding name that started with an "S." Although she could not identify the name during Alcox's trial,  
27 she now knew it to be "Sanjay." This became clear to her after she started working with a doctor who  
28 had the same name.

1 m) John Alcox (John)

2 John testified he is Alcox's brother and that he never heard his brother talk about the murder or  
3 admit any involvement. With respect to his brother's substance abuse in 1986, John testified Alcox  
4 used marijuana and drank alcohol on a daily basis starting at approximately 6:00 a.m. He also used  
5 LSD.

6 n) Varuna Tejwani (Tejwani) - Gujarati translator

7 Tejwani testified that "Sanju," "Sanjo," and "Sanjoyo" are common nicknames for "Sanjay." The  
8 first two nicknames are typically used by an older person when speaking to a younger one, and the  
9 third one is generally used in anger.<sup>42</sup>

10 2) Court's ruling<sup>43</sup>

11 Following the hearing, the superior court granted the petition and set aside the conviction.  
12 Despite the prehearing rulings, the superior court found that Alcox had received ineffective assistance  
13 of trial counsel because his attorney failed to: 1) investigate evidence of an alibi and 2) present a  
14 plausible argument for innocence by assuming the confession was completely true and neglecting to  
15 challenge any of the facts contained within the confession.<sup>44</sup>

16 However, the superior court did not make a finding of factual innocence and stated:

17 The law requires that the prosecution's case be completely  
18 undermined by the new evidence. I find that it is not completely  
19 undermined; the conflicts in evidence that existed at the time of trial  
20 still remain. There is additional evidence which has been  
presented, some the court finds credible and some not so credible.  
That is not enough to grant the [factual innocence] request.

21 (AG's Exhibit 78, at p. 2502.)

22 The court then made the following findings:

23 a) After stating that the court had listened to the entire tape of Alcox's interview  
24 multiple times and reviewed the transcript, the court found that Alcox's confession was "freely and

25 \_\_\_\_\_  
26 <sup>42</sup> AG's Exhibit 61, at pp. 2128-2130.

27 <sup>43</sup> AG's Exhibit 78.

28 <sup>44</sup> Alcox's trial counsel had passed away by this time and did not testify in the proceedings.

1 voluntarily given” and not coerced. The court stated that, “Despite Mr. Alcox’s claim that he was  
2 suffering the effects of recent drug and alcohol consumption, none of these claims are evidenced in the  
3 interview.”<sup>45</sup>

4 b) While Lothery’s testimony exonerated Alcox, Lothery is not a credible witness.  
5 Not only has he given multiple versions of the murder, but “his demeanor while testifying and selective  
6 memory concerning the events make his testimony suspect.”<sup>46</sup>

7 c) While Gonzales’s testimony was contradicted by Garcia, she did not repudiate  
8 her prior testimony and stated she would not intentionally lie.<sup>47</sup>

9 d) While Kelly’s and Maniscalco’s testimony pointed to Sanjay as the shooter,  
10 Sanjay was not a new player and had already been presented as the shooter during the trial.<sup>48</sup>

11 e) Alcox’s and Lothery’s jailhouse conversations “did not appear inconsistent with  
12 the theory that Lothery was stunned that Alcox would have falsely confessed and dragged Lothery, who  
13 was in fact guilty, down with him, or that Alcox hoped to correct the situation by retracting the false  
14 confession. *It is also possible to read them to suggest that Alcox would falsely retract his true*  
15 *confession* [emphasis added].”<sup>49</sup>

16 The court concluded by clarifying that the ruling only concerned the effectiveness of defense  
17 counsel’s representation by stating:

18 This is not to say that Joel Alcox is in fact innocent of the charged  
19 crimes. The confession of Joel Alcox remains. It is possible  
20 Mr. Lothery is lying, that the decedent did not really utter anything  
21 like “Sanjay” when asked who shot him, that the alibi witnesses  
22 may not be believed, that Caroline Gonzales testified truthfully in  
23 1986 about a conversation she no longer recalls and that the other  
24 claimed participant denies, that Lothery and Alcox knew they were  
25 being recorded and concocted a clever ruse to fool authorities, and  
26 that either Sanjay Patel had no involvement or that all three men

24 <sup>45</sup> AG’s Exhibit 78, at p. 2501.

25 <sup>46</sup> AG’s Exhibit 78, at p. 2501.

26 <sup>47</sup> AG’s Exhibit 78, at p. 2501.

27 <sup>48</sup> AG’s Exhibit 78.

28 <sup>49</sup> AG’s Exhibit 78, at p. 2503.

1 committed the crime, the new Lothery confession notwithstanding.  
2 What can be said, however, is that the failure to raise a defense of  
3 innocence deprived Mr. Alcox of the facts that strongly raise issues  
4 of reasonable doubt.

(AG's Exhibit 78, at p. 2505.)

5 3) Challenge of court's ruling

6 The State of California appealed the judgement. The Court of Appeal reversed the superior  
7 court's decision in a published opinion filed on March 10, 2006, finding that Alcox had received *effective*  
8 assistance of counsel.<sup>50</sup>

9 Alcox filed a petition for review with the California Supreme Court. The Supreme Court denied  
10 his request.

11 C. 2006 state habeas petition

12 In July 2006, Alcox filed a third habeas petition in the superior court. The court denied it as a  
13 successive petition. In addition, the court found "the purported new evidence [does not] give rise to a  
14 constitutionally grounded exception [to the bar against filing a success petition – actual innocence]...  
15 especially...in light of both the Superior Court and Appellate Court findings of fact and conclusions of  
16 law in the prior writ."<sup>51</sup>

17 Later that same year, Alcox filed a petition with the California Supreme Court. After requesting  
18 an informal response from the State of California, the California Supreme Court denied the petition  
19 without explanation.

20 **VII. Federal Court Habeas Proceedings**

21 A. 2008 habeas petition filed in the United States District Court for the Central District of  
22 California (district court)

23  
24  
25  
26 <sup>50</sup> *In re Alcox* (2006) 137 Cal.App.4th 657.

27 <sup>51</sup> *Alcox v. Hartley*, *supra*, 614 F.Supp.2d at p. 1069, citing to the superior court decision dated  
28 November 20, 2006.

1 In 2008, Alcox filed his first federal habeas petition asserting he had received ineffective  
2 assistance of trial counsel.<sup>52</sup> The AG moved to dismiss the petition as untimely because it was filed  
3 almost 11 years beyond the one-year federal statute of limitations.<sup>53</sup> In opposition to the motion to  
4 dismiss, Alcox contended the statute of limitations had been statutorily tolled, pursuant to 28 U.S.C.  
5 section 2244, subdivision (d)(1)(D), because he alleged he had exercised due diligence in discovering  
6 the factual predicate of his ineffective assistance of counsel claim. He further contended he was  
7 entitled to equitable tolling of the statute of limitations because he was actually innocent of the murder -  
8 an “extraordinary circumstance” for purposes of equitable tolling.<sup>54</sup> Alcox’s actual innocence claim was  
9 based on the following evidence:

10 1) Lothery’s declaration obtained in 2003<sup>55</sup>

11 In his declaration, Lothery stated that, after drinking in a park with friends, he met up with  
12 Sanjay and the two went to locate more alcohol. Lothery suggested they steal the alcohol but Sanjay  
13 said he had a power drill they could try to sell to the victim, his “uncle.” When they entered the motel’s  
14 office, the victim was standing behind the counter. Lothery stood just inside the room near the entry  
15 door. Following an argument between Sanjay and the victim, Sanjay took a gun from the back of his  
16 waist, pointed it at the victim, and ultimately shot him. Lothery immediately fled the scene.

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19 <sup>52</sup> Alcox also challenged the voluntariness of his confession, contending it was based on coercive and  
20 suggestive interrogation tactics; however, the court subsequently declined to consider the issue  
21 because it had been “fully and fairly litigated at [Alcox’s] trial and on direct appeal,” and “any attempt to  
22 now raise the issue on federal habeas review is untimely.”

23 <sup>53</sup> Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) a state prisoner must file  
24 a federal habeas petition within one year of the “date on which the judgement became final by the  
25 conclusion of direct review or the expiration of the time for seeking such review...or the date on which  
26 the factual predicate of the claim or claims presented could have been discovered through the exercise  
27 of due diligence,” whichever is later. (28 U.S.C. § 2244, subd. (d).)

28 <sup>54</sup> In order to present a successful equitable tolling argument, a petitioner bears the burden of proving:  
“(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood  
in his way.” (*Alcox v. Hartley, supra*, 614 F.Supp. 2d at p. 1072, citing to *Pace v. DiGuglielmo* (2005)  
544 U.S. 408, at pp. 418-419.)

<sup>55</sup> Lothery’s declaration was first brought before the courts at Alcox’s state evidentiary hearing. Lothery  
also testified at that proceeding on Alcox’s behalf.

1                   2) Declarations from Charles Robb (Robb), Sean Daugherty (Daugherty), Roberta  
2                   Cornelison Ude (formerly Cornelison), and Kathleen Webb Schmidt (formerly  
3                   Webb) obtained in 2006

4                   Robb stated he remembered the night of the shooting. In the afternoon leading up the murder,  
5 Hughes and Alcox had come to his apartment about 4:00 p.m. and invited him to a party at Hughes's  
6 house. The group had divided into two vehicles to visit other friends and invite them to the party.  
7 Robb and Craig Hamel (Hamel) left in one car, and Hughes and Alcox left in another. The two  
8 vehicles then drove to Hughes's house and Robb remained at the party for several hours. Alcox was  
9 at the party during this entire time.

10                  Daugherty stated he remembered the night of the shooting. He arrived at the party in the "early  
11 evening" and Alcox was not there. Daugherty then left for some unspecified period of time to pick up  
12 Webb and "thinks" Alcox was at the party by the time he returned.

13                  Cornelison stated that, on the evening of the murder, Webb picked her up in Daugherty's car.  
14 They got something to eat first and arrived at the party in the "early evening." Alcox was not at the  
15 party at that time. Cornelison then went upstairs with Hughes for "a while" and saw Alcox when she  
16 returned back downstairs.

17                  Webb stated she arrived at the party in the "late afternoon" and Alcox was not there. She  
18 stayed at the party for "a while," then borrowed Daugherty's car to pick up Cornelison. When they  
19 returned to the party, "after it was dark," Alcox was there.

20                   3) Gonzales's 2006 declaration<sup>56</sup>

21                  Gonzales stated she has never "felt comfortable with my testimony. I believe the combination of  
22 rumors and speculation, rife at the time of this incident[,] and the use of mind-altering drugs[,] there is a  
23 great possibility that any testimony I gave was inaccurate."

24                   4) Testimony from Kelly and Maniscalco, and 2006 declaration from Lompoc Fire  
25                   Captain Roy Belluz (Belluz)

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27 <sup>56</sup> Gonzales's 2006 declaration was not before the superior court at Alcox's state evidentiary  
28 proceedings and hearing.

1 As previously noted, Kelly, a first responder who treated and spoke with the victim at the scene,  
2 testified at Alcox's state evidentiary hearing that Patel clearly stated he knew the shooter and provided  
3 a foreign-sounding name that started with an "S." Although she could not identify the name during the  
4 trial, she now knows it to be "Sanjay." This became clear to her after she started working with a doctor  
5 who had the same name.

6 Maniscalco, who also testified at Alcox's state evidentiary hearing, stated she had assisted in  
7 caring for Patel and clearly heard him identify the assailant as "Sanjay."

8 In his declaration, Belluz identified himself as one of the first responders on the scene of the  
9 shooting. He stated that he had asked Patel about what happened and who had hurt him, and Patel  
10 had responded by repeatedly saying a name that sounded like "Singji" or "Sergenal." In 2005, Belluz  
11 read a news article about the murder which mentioned that a man named "Sanjay" may have been  
12 involved. He then realized that the name "Sanjay" was more like what he heard the victim say.

#### 13 B) Court's ruling

14 In 2009, the district court denied Alcox's habeas petition as untimely.<sup>57</sup> First, the district court  
15 found that neither the filing of his state habeas petitions nor 28 U.S.C. section 2244, subdivision  
16 (d)(1)(D) tolled the one-year federal statute of limitations because Alcox had failed to exercise due  
17 diligence in discovering the factual basis for his ineffective assistance of counsel claim.

18 Second, the district court found that Alcox was not entitled to equitable tolling of the statute of  
19 limitations because of his failure to exercise due diligence and his failure to present a credible claim of  
20 actual innocence, the ground on which his extraordinary circumstance assertion relied. In order to  
21 present a credible claim of actual innocence, a petitioner must support his allegations with: 1) new  
22 reliable evidence that was not presented at trial and 2) show that it was more likely than not that no  
23 reasonable juror would have found him guilty beyond a reasonable doubt.<sup>58</sup> The district court stated  
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27 <sup>57</sup> *Alcox v. Hartley*, *supra*, 614 F.Supp. 2d.

28 <sup>58</sup> *Schlup v. Delo* (1995) 513 U.S. 298, at pp. 324, at pp. 326-327.

1 that, to the extent Alcox's evidence could be considered "new," it did not show that "it is more likely than  
2 not that no reasonable juror would have found [him] guilty beyond a reasonable doubt."<sup>59</sup>

3 a) Lothery

4 Initially, the district court noted that Lothery's statements were key to Alcox's claim of actual  
5 innocence. The court then stated that, to the extent Lothery's declaration and testimony at the state  
6 evidentiary hearing could be considered "new" evidence, they are "clearly not reliable" for the following  
7 reasons:<sup>60</sup>

8 First, while Lothery's declaration served to exonerate Alcox, it also attempted to paint his  
9 (Lothery's) level of participation in the murder in a more blameless light by contending he was an  
10 innocent bystander who was unaware Sanjay was armed.

11 Second, the superior court in which the state evidentiary hearing was held found that Lothery  
12 was not a credible witness based on his testimony and demeanor at the hearing – a finding to which the  
13 district court stated it was required to give deference.<sup>61</sup>

14 Third, even if the federal court were not required to give deference to the superior court's  
15 credibility findings, the district court stated it would still find Lothery's declaration and evidentiary  
16 hearing testimony "inherently unreliable since, among other reasons, Lothery admitted he had  
17 repeatedly lied to the police, had changed his story several times, and was unable to remember various  
18 important details regarding the murder and subsequent events."<sup>62</sup>

19 For these reasons, the district court found that, even if Lothery had testified at Alcox's trial and  
20 repeated the statements he subsequently made in his declaration and at the evidentiary hearing, Alcox  
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22  
23 <sup>59</sup> *Alcox v. Hartley, supra*, 614 F.Supp. 2d at p. 1080.

24 <sup>60</sup> *Alcox v. Hartley, supra*, 614 F.Supp. 2d at p. 1075. In a footnote, the court added that Lothery's  
25 statements were not made any more reliable because Deroin (Lothery's former girlfriend) and Voysey  
26 (Lothery's trial counsel) testified at the state evidentiary hearing on Alcox's habeas petition that Lothery  
told them Sanjay was the shooter. (*Id.* at p. 1075, fn. 9.)

27 <sup>61</sup> *Alcox v. Hartley, supra*, 614 F.Supp. 2d at p. 1076.

28 <sup>62</sup> *Ibid.*



1 still failed to show that “it is more likely than not that no reasonable juror would have found [him] guilty  
2 beyond a reasonable doubt.”<sup>63</sup>

3 The district court then turned to Alcox’s alibi witnesses. After noting that the witnesses’  
4 declarations were not “new” because police had interviewed them during their investigation and both  
5 Alcox and his counsel were aware of their statements before trial, the district court proceeded to  
6 address the declarations on the ground that they were “newly presented” evidence.

7 b) The “alibi” witnesses: Robb, Daugherty, Cornelison, and Webb

8 First, the district court stated that none of the alibi witnesses’ declarations helped Alcox  
9 establish his claim of actual innocence under *Schlup* because only one of the statements (Robb’s  
10 declaration) definitively accounted for the period of time the murder was committed. Because the  
11 remaining declarations from Daugherty, Cornelison, and Webb were vague, they failed to exclude the  
12 possibility Alcox committed the murder.

13 Second, the district court found that Robb’s declaration was insufficient to meet the *Schlup*  
14 standard because it was inconsistent with the declarations of the other three “alibi” witnesses who  
15 stated Alcox was not at the party at the time the murder was committed.<sup>64</sup> In addition, Robb’s  
16 declaration was contradicted by police reports and investigative interviews prepared closer in time to  
17 the murder in which other witnesses stated Robb himself was not at the party.<sup>65</sup>

18 Finally, the district court noted that the appellate court found that Alcox jailhouse conversations  
19 consisted of a discussion on concocting a false alibi defense,<sup>66</sup> and cited to statements made by both  
20 Alcox and Garcia which showed that Alcox was not at the party at the time of the murder. In particular,  
21 the district court noted that the appellate court had made an unrebutted factual finding that Garcia, who  
22 testified on Alcox’s behalf at the state evidentiary hearing, told another person (Leslie Gibeau) that he

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23  
24 <sup>63</sup> *Ibid.*, citing to *Schlup v. Delo*, *supra*, 513 U.S. at pp. 324, 327.

25 <sup>64</sup> While Daugherty, Cornelison, and Webb all claim to have seen Alcox at the party at Hughes’s house  
26 on the night of the murder, they all stated they did not see him until well after the murder occurred.

27 <sup>65</sup> *Alcox v. Hartley*, *supra*, 614 F.Supp. 2d at p. 1078.

28 <sup>66</sup> This finding was based on Seilhamer’s testimony, which has since been brought into question.

1 had heard from Lothery that Lothery and Alcox were walking through the motel when they heard a  
2 shot.<sup>67</sup>

3 c) Gonzales's 2006 declaration<sup>68</sup>

4 The district court then concluded that neither Gonzales's nor Garcia's statements satisfied the  
5 *Schlup* requirements for the following reasons.<sup>69</sup>

6 First, Gonzales's declaration was inadmissible because it was not signed under penalty of  
7 perjury.

8 Second, the superior court judge that presided at the state evidentiary hearing specifically  
9 found that Gonzales did not repudiate her prior testimony as claimed. Rather, the superior court noted  
10 that, while she appeared concerned about her trial testimony because she had been young at the time  
11 and was using drugs, she also said she "would not intentionally lie."<sup>70</sup> Therefore, Gonzales's post-trial  
12 statements, at best, could have been used to attack the credibility of her statements at trial.

13 Third, to the extent Garcia had previously testified that Alcox did not make any incriminating  
14 statements in the alleyway behind his house, as testified to by Gonzales, his testimony had limited value  
15 because, at most, it could be used to attack Gonzales's credibility.

16 d) "New" evidence from Kelly, Maniscalco, and Belluz

17 The district court found that the statements from Kelly, Maniscalco, and Belluz implicating  
18 Sanjay did not constitute "new" evidence because defense counsel had presented evidence at trial to  
19 show that Sanjay was the shooter.<sup>71</sup> In any event, the district court found that the statements of these  
20 three witnesses also failed to meet the *Schlup* standard.<sup>72</sup>

21 <sup>67</sup> *Alcox v. Hartley, supra*, 614 F.Supp. 2d at p. 1079.

22 <sup>68</sup> Gonzales's 2006 declaration was not before the superior court during Alcox's state evidentiary  
23 proceedings and hearing.

24 <sup>69</sup> *Ibid.*

25 <sup>70</sup> *Alcox v. Hartley, supra*, 614 F.Supp. 2d at p. 1079.

26 <sup>71</sup> Sanjay's 911 phone call was played for the jury and testimony was presented on the issue of whether  
27 "Sanjo" was a nickname for Sanjay.

28 <sup>72</sup> *Alcox v. Hartley, supra*, 614 F.Supp. 2d at p. 1080.

1           Accordingly, the district court denied Alcox's petition for having been filed approximately 11  
2 years after the federal statute of limitations had expired.

3                           C) Challenge of court's ruling

4           Alcox challenged the district court's decision and the Ninth Circuit Court of Appeal reversed  
5 and remanded the matter for an evidentiary hearing on the issue of timeliness.<sup>73</sup> The district court  
6 found that Alcox was never afforded an evidentiary hearing on the issue of whether he exercised due  
7 diligence, and that the district court had mistakenly evaluated the wrong time period and erroneously  
8 determined that Alcox had failed to offer any reasons for the delay in filing his first habeas petition.

9           Thereafter, the district court held an evidentiary hearing on the issue of timeliness.<sup>74</sup> Following  
10 an evidentiary hearing, the district court concluded Alcox had failed to demonstrate due diligence and  
11 again denied the petition as untimely.

12           Alcox appealed the district court's decision. On November 20, 2014, the Ninth Circuit  
13 concluded that Alcox *had* exercised due diligence sufficient to delay the commencement of AEDPA's  
14 one-year filing deadline, reversed the district court's judgment, and remanded the matter to the district  
15 court for a decision on the merits of Alcox's ineffective assistance of counsel claims as set forth in his  
16 2006 habeas petition.<sup>75</sup>

17                           D) 2015 district court decision based on the allegations and evidence presented in  
18                                 Alcox's third petition for writ of habeas corpus that was filed in 2006

19           On November 3, 2015, the magistrate judge reached the merits of Alcox's ineffective assistance  
20 of counsel claims and recommended that the petition for writ of habeas corpus be granted and that  
21 Alcox be released from custody and all the collateral consequences that resulted from his conviction.<sup>76</sup>  
22 The magistrate judge found that, under the circumstances surrounding Alcox's case, the cumulative

23 \_\_\_\_\_  
24 <sup>73</sup> *Alcox v. Hartley* (9th Cir. Dec. 27, 2010, No. 09-55825) 2010 U.S. App. LEXIS 26625.

25 <sup>74</sup> *Alcox v. Hartley* (C.D. Cal. Nov. 19, 2012) 2012 U.S. Dist. LEXIS 172972.

26 <sup>75</sup> *Alcox v. Beard* (9th Cir. 2015) 2015 U.S. App. LEXIS 231.

27 <sup>76</sup> *Alcox v. Beard* (C.D. Cal. Nov. 3, 2015) 2015 U.S. Dist. LEXIS 176140.

28 Alcox was released from prison on March 29, 2012, during the on-going litigation challenging the  
validity of his conviction.

1 effect of trial counsel's failure to investigate and present exculpatory evidence was so prejudicial that a  
2 reversal of the conviction was warranted due to the ineffective assistance of counsel.<sup>77</sup> In summarizing  
3 the evidence that could have been presented to "significantly undermine" the reliability of each piece of  
4 the prosecution's case, the magistrate judge stated:

5 there was evidence that: (1) [Alcox's] confession was the result of  
6 coercive police techniques that resulted in a false confession; (2) [Alcox]  
7 was, as he told the police, at Hughes's house at the time of the crime; (3)  
8 the other persons whom Gonzales claimed participated in the  
9 conversation in the alley denied that the conversation took place; (4) the  
10 complete recorded jailhouse conversations between [Alcox] and Lothery  
11 (as compared to Seilhamer's testimony about a portion of the  
12 conversations) were exculpatory and confirmed that [Alcox] had falsely  
13 confessed; and (5) Sanjay – who not only had called the police in an  
14 attempt to confess to the murder but who also told at least one other  
15 person that he shot [the victim] – was identified as the shooter by [the  
16 victim].

17 (*Alcox v. Beard, supra*, 2015 U.S. Dist. LEXIS at pp. 2-3.)

18 1) Specifics of district court's ruling

19 a) Trial counsel failed to investigate and present testimony of alibi witnesses, and  
20 challenge the veracity of Alcox's confession

21 Although Alcox told his attorney his confession was false, asserted he had been at a party at  
22 Hughes's house at the time of the murder and provided the names of five individuals he claimed to  
23 have been with on that night, including Hughes, Manuel Santos (Santos), Chuck Garcia ("Chuck"),  
24 Robb, and Craig Hamel (Hamel), counsel never interviewed any of them.<sup>78</sup> All five witnesses were  
25 interviewed by police and corroborated Alcox's statement he was at the party on February 16, 1986.  
26 While the prosecution located other individuals who may not have recalled seeing Alcox at the party,  
27 the magistrate judge found they were not inherently more credible or reliable than the witnesses who

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28 <sup>77</sup> The district court also stated that, to the extent the Court of Appeal rejected petitioner's ineffective  
assistance of counsel claim after finding that trial counsel's performance fell within the range of  
reasonable professional assistance, the appellate court's decision was based on an "unreasonable  
application" of *Strickland*.

<sup>78</sup> See statements at pages 36-38 of this proposed decision.

1 did see him there, even though some of the witnesses who reported seeing Alcox at the party were  
2 only acquaintances of Alcox, rather than close friends, and had no motive to lie for him.<sup>79</sup>

3 Further, trial counsel made no attempt to challenge the veracity of the confession. In fact,  
4 rather than questioning Sergeant Heidt about the confession and the circumstances surrounding the  
5 interrogation, he simply asked the officer a few questions about Alcox's description of the gun he  
6 alleged Lothery had used.

7 b) Trial counsel did not attempt to interview Gonzales at all, and did not attack her  
8 credibility or recollection, or confront her with her prior inconsistent statements  
9 to law enforcement

10 Because counsel never conducted an investigation into the veracity of Gonzales's claims or  
11 asked her any questions on cross-examination, he was not in a position to present any evidence to  
12 impeach her testimony; specifically, evidence of her drug use and statements by other percipient  
13 witnesses that contradicted her assertions.

14 The magistrate judge noted that Gonzales had a history of "substantial" drug use prior to and  
15 during the trial which could have affected her ability to accurately perceive or recollect an event, and  
16 pointed to statements she made to both Alcox's investigator (Castillo) and the DA's investigator (Ellis)  
17 in 2004, as well as her 2006 declaration. Specifically, Gonzales told Alcox's investigator during their  
18 first conversation that her testimony had been drug-induced and was "not truthful".<sup>80</sup> She  
19 subsequently told him she had been so high on drugs at the time she allegedly overheard the alleyway  
20 conversation she was concerned whether the statement she testified to was real or imagined.<sup>81</sup> She  
21 also expressed that same concern to the DA's investigator, but told him that she had testified as to  
22 what she remembered and did not lie.<sup>82</sup> When asked why she had never previously mentioned her  
23 concerns about her testimony, Gonzales stated it did not matter anyway because Alcox had already

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24  
25 <sup>79</sup> *Alcox v. Beard, supra*, 2015 U.S. Dist. LEXIS at p. 42.

26 <sup>80</sup> AG's Exhibit 60, at pp. 2031, 2036.

27 <sup>81</sup> AG's Exhibit 60, at pp. 2033-2034, 2037.

28 <sup>82</sup> AG's Exhibit 61, at pp. 2242-2243.

1 confessed.<sup>83</sup> Finally, in her 2006 declaration, Gonzales stated that, due to her use of mind-altering  
2 drugs during the time surrounding the murder and trial, as well as rumors in the community, “there is a  
3 great possibility that any testimony I gave was inaccurate.”<sup>84</sup>

4 The magistrate judge then noted that Gonzales had identified three other individuals who were  
5 present in the alleyway when Alcox allegedly admitted his involvement in the murder (Garcia, George  
6 Taylor, and Scotty Kirchoff). All three of these percipient witnesses were interviewed by police and  
7 contradicted Gonzales’s account of the conversation. According to the three, Alcox was not even  
8 present during the conversation and, therefore, could not have told them he was involved in the  
9 murder.<sup>85</sup>

10 c) Trial counsel failed to investigate and present exculpatory evidence contained in  
11 the recorded jailhouse conversations between Alcox and Lothery, as testified to  
12 by Seilhamer<sup>86</sup>

13 Because counsel never requested a copy of the recordings or the transcripts of the jailhouse  
14 conversations, he was not in a position to impeach Seilhamer. In fact, he did not cross-examine her at  
15 all. While her testimony recounting these conversations suggested that Alcox and Lothery were  
16 together at the motel when the murder was committed, Alcox was going to claim his confession was a  
17 lie, and Alcox was going to present a false alibi, the magistrate judge stated that the statements on  
18 which these impressions were created were taken completely out of context. In fact, the magistrate  
19 judge found that Seilhamer’s account of the conversations was “arguably misleading” if not a  
20 “complete mischaracterization of the conversation.” The magistrate judge stated that, had counsel  
21 presented the remainder of the conversations to the jury, Seilhamer’s testimony would have been

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22  
23 <sup>83</sup> AG’s Exhibit, 61, at p. 2243. Gonzales told police about the conversation she allegedly overheard in  
24 April 1986 – after Alcox had confessed.

25 <sup>84</sup> AG’s Exhibit 65.

26 <sup>85</sup> One of the witnesses stated Alcox may have briefly approached the group to tell them they could not  
27 be in the alleyway, but nothing else.

28 <sup>86</sup> See Exhibit 1 for additional, relevant excerpts from the jailhouse conversations between Alcox and  
Lothery.

1 undermined because other statements would have shown that Alcox had been drinking heavily and  
2 ingested LSD before his interrogation; had very little sleep the night before the interrogation and was  
3 anxious to be done with the questioning; could not remember what he did the weekend of the murder;  
4 did not even know what happened at the motel; and was dumbfounded as to why he had confessed.<sup>87</sup>  
5 For his part, Lothery expressed disbelief that Alcox had implicated himself in a crime that occurred  
6 when he (Alcox) was not even present.<sup>88</sup>

7 d) Trial counsel's failure to investigate evidence that Sanjay was the shooter and  
8 present "significant available evidence supporting that defense"

9 First, the magistrate judge pointed to three individuals who could have bolstered the assertion  
10 that Sanjay was the shooter:

11 i) Michael Coleman (Coleman)

12 Coleman was friends with Sanjay and knew that Sanjay and Fritz were dating at the time of the  
13 murder.<sup>89</sup> Coleman told law enforcement that Sanjay confessed to him on three occasions that he  
14 (Sanjay) had killed Patel and described the details of the facial injury. He also stated that Sanjay had  
15 temporarily stashed the gun at Fritz's house and later offered Coleman \$10,000 to keep quiet. Years  
16 later, while being interviewed in preparation for the state evidentiary hearing, Coleman told police  
17 Sanjay had shown him a paper bag containing the gun and asked him to dispose of it.

18 ii) Derion

19 Derion, Lothery's girlfriend at the time of the murder, told police in 1986 that Lothery stated he  
20 was present when Patel was killed and that Sanjay was the shooter. Because she did not know who  
21 Sanjay was at that time, Lothery subsequently pointed him out to her. Derion reiterated these  
22 statements while testifying at Alcox's state evidentiary hearing.

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24  
25 <sup>87</sup> *Alcox v. Beard, supra*, 2015 U.S. Dist. LEXIS at pp. 16, 20, 58, 63; AG's Exhibit 31, at pp. 253-254,  
26 256-257.

27 <sup>88</sup> AG's Exhibit 31, at pp. 253, 258.

28 <sup>89</sup> At the time of the murder, Coleman was dating Fritz's sister.





1 for "Sanjay," and that these nicknames are typically used by an older person when speaking to a  
2 younger one.<sup>90</sup>

3 e. Trial counsel erroneously conceded that Alcox tried to fabricate an alibi

4 The magistrate judge concluded:

5 [w]ithout conducting any investigation, trial counsel then adopted a defense  
6 that was both factually farfetched (because it required the jury to believe that  
7 [Alcox] went to the motel with Lothery to steal money, that [Alcox] was  
8 unaware that Sanjay happened to be at the motel at the same time, and that  
9 even though Lothery had a gun, it was Sanjay who independently shot and  
10 killed [Patel] and legally unsupportable (because 'withdrawing from a  
11 conspiracy' is not a defense to felony murder). This so-called defense was  
12 based upon trial counsel's apparent assumption that [Alcox] was indefensibly  
13 guilty, that his confession was not only true but also unassailable, and that  
14 investigating defenses or impeaching prosecution witnesses would be futile.

15 (*Alcox v. Beard, supra*, 2015 U.S. Dist. LEXIS at pp. 23-24.)

16 The AG filed objections to the magistrate judge's findings and recommendations. The district  
17 court conducted a de novo review of the portions to which the objections were directed and adopted the  
18 findings of fact, conclusions of law, and recommendations contained in the magistrate judge's Report  
19 and Recommendation on February 12, 2016.<sup>91</sup>

20 2) Challenge of district court's opinion

21 The AG declined to appeal the district court's decision. According to the AG's briefing filed in  
22 this 4900 proceeding, the DA declined to re-try Alcox because Alcox had completed his prison term and  
23 was not the shooter. In addition, the DA believed a re-trial on an almost 30-year-old case would take  
24 resources from other prosecutions.

25 **VIII. CalVCB Proceedings**

26 Alcox submitted his CalVCB application as an erroneously convicted person on August 2, 2016.  
27 Alcox asserts that, pursuant to *Madrigal v. California Victim Compensation & Government Claims*  
28 *Board* (2016) 6 Cal.App.5th 1108 (*Madrigal*), the Board is bound by the factual findings and credibility

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<sup>90</sup> A Gutarati translator testified to that effect during the state court evidentiary hearing.

<sup>91</sup> *Alcox v. Beard, supra*, 2016 U.S. Dist. LEXIS.

1 determinations of the district court's 2016 decision, and contends that the findings and determinations  
2 meet his burden of establishing actual innocence by a preponderance of the evidence.

3 A. AG's Response<sup>92</sup>

4 1) Evidence of Alcox's guilt

5 The AG acknowledges that confessions are one of the strongest indications of guilt, but asserts  
6 there is too much conflicting evidence in this case for Alcox's confession to stand. Instead, he  
7 concedes that, based on the myriad of evidence from the numerous witnesses who either support  
8 Alcox's alibi, contradict his confession, or show that Sanjay was the shooter, Alcox has demonstrated  
9 his innocence of the murder by the preponderance of the evidence standard. He then elaborates as  
10 follows:

11 a) Alcox's confession

12 Alcox had a history of drinking too much and taking drugs such as marijuana, cocaine, and  
13 LSD. On March 23, 1986, two days before he was brought in for questioning for the murder, Alcox  
14 was arrested for public intoxication. Upon his release from custody the following day, March 24, 1986,  
15 he immediately resumed his alcohol consumption and ingested LSD either that afternoon or evening.  
16 He then had little to no sleep that night. He was picked up by police for questioning in relation to the  
17 murder on the morning of March 25, 1986. Although he was offered food and beverage throughout the  
18 day, he declined to eat anything.

19 Against that backdrop, the AG states that, while there is no evidence the confession was  
20 coerced, it appears to have been the product of the "poor judgment of a young man who wasted his  
21 days on drugs and alcohol." Accordingly, the AG concedes it does not support a finding of guilt.<sup>93</sup> The  
22 AG then highlights the aspects of the confession which, in his opinion, are the most troubling.

23 First, during the interrogation, the investigators offered Alcox information about the murder that  
24 he simply repeated in making his confession. They described the scene and the victim, provided a  
25 \_\_\_\_\_

26 <sup>92</sup> For brevity, only the facts, arguments, and analysis found pertinent to this proposed decision are  
27 summarized.

28 <sup>93</sup> AG's response, at p. 20.

1 motive, and discussed the sequence of events once Patel entered the motel's office to confront the  
2 intruders.

3 Second, parts of Alcox's confession were inconsistent with other evidence. Alcox incorrectly  
4 stated there had been a cash register when, in fact, the money was kept in a drawer.<sup>94</sup> He also spoke  
5 of hearing two shots when, in fact, there were three. He provided a description of the clothing worn by  
6 Lothery that contradicted what other witnesses stated. He described the victim as just under 5'11"  
7 when he was actually 5'4". In addition, Alcox's confession incorrectly described his whereabouts  
8 before and after the murder. While he stated he was in the park drinking with Lothery and two others  
9 prior to the murder, one of the those individuals (Kasinowicz) told police in 1986 that he was out of  
10 town that day and the other (De La Torre) gave conflicting accounts of his whereabouts. Alcox also  
11 stated he ran back to his trailer after the shooting, but there are witnesses who placed him at Hughes's  
12 party at that time.

13 b) Insufficient corroborating evidence

14 The AG states there is little evidence to corroborate the confession. He then contends that  
15 what little evidence there is - the testimony of Gonzales and Seilhamer - is weak, at best, if not entirely  
16 unreliable. Specifically, he asserts that Gonzales's testimony was unreliable and that the jailhouse  
17 conversations had little value in light of the ambiguity of their content. While the AG acknowledges  
18 that, if there had there been evidence Alcox and Lothery knew they were being monitored, their  
19 awareness of that fact would suggest the conversations could be interpreted as the concocting of a  
20 false defense; however, he states there is no evidence that definitively shows either of them knew.

21 3) Evidence pointing towards Alcox's innocence

22 a) Alibi evidence

23 The AG submits that, given Alcox's inconsistencies and gaps in memory, his own statements of  
24 his alibi deserve no weight. Despite that, the AG asserts that Alcox's witnesses, overall, do support his  
25 claim of innocence as follows. In his brief, the AG refers to the following individuals:  
26  
27

28 <sup>94</sup> Alcox also repeatedly referred to it as a drawer.

1 *Hughes's statement*

2 Hughes told police he was not entirely sure whether he had a party the night of the murder.  
3 After he was shown a calendar, he was sure he had hosted a party on February 16, 1986, and that  
4 people had started arriving about 5:00 p.m.; however, he could not recall whether Alcox had been  
5 there.

6 *Santos's statement*

7 Santos initially denied attending the party and stated he had been home all day. He later  
8 admitted he had been at the party but could not recall whether Alcox had been there. Approximately  
9 one month later, he told Lothery's investigator that Alcox definitely was there.

10 *Chuck Garcia's (Chuck) statement*

11 While Chuck Garcia was not entirely clear on the date of the party, he did remember that Alcox  
12 had attended the party and that he arrived at the party with Hughes.

13 *Robb's statement*

14 Robb clearly remembered that Hughes had thrown a party on the night of the murder and stated  
15 he had been with Alcox from 4:00 p.m. to well after 8:00 p.m.

16 *Hamel's statement*

17 Hamel told police he had gone to several parties at Hughes's house and stated that Alcox would  
18 always be there when he arrived. He subsequently told Lothery's investigator that he had attended two  
19 parties at Hughes's house during the three-day weekend the murder was committed, but could not  
20 remember the specific days. He was unable to give any clear indication as to whether Alcox had been  
21 at the barbeque that took place the night of the murder.

22 *Birgette Barker's (Barker) statement*

23 Barker stated she remembered attending the party at Hughes's house. Because she worked  
24 until 7:40 p.m., she knew she would have arrived at the party about 7:45 p.m. She saw Alcox at the  
25 party when she arrived.

26 *Daugherty's statement*

27 Daugherty stated he arrived at the party at approximately 7:00 p.m. Alcox was not there at that  
28 time; however, he later saw Alcox at approximately 8:30 p.m. One month later, he told Lothery's

1 investigator that he had arrived at the party between 6:30 p.m. and 7:00 p.m., and that Alcox was not  
2 there. He later saw Alcox there at either 7:30 p.m. or 8:30 p.m.

3 *Cornelison's statement*

4 Cornelison stated she arrived at the party between 6:30 p.m. and 7:00 p.m. and Alcox was not  
5 there. After she arrived, she went upstairs for a few hours. When she came back downstairs about  
6 9:00 p.m., Alcox was there.

7 *Webb's statement*

8 Webb stated she arrived between 5:30 and 6:30 p.m., but did not see Alcox. She then left the  
9 party for a short period of time and returned about 8:00 p.m. After she returned, she saw Alcox;  
10 however she was unsure whether he was there when she returned or arrived shortly thereafter.

11 *John Alcox's statement*

12 John initially told police he did not know where his brother had been on the night of the murder.  
13 A few days later, he told police they had both been at the barbeque at Hughes's house and had spent  
14 the night there. The following day, he stated he did not know whether his brother had been at Hughes's  
15 house on the night of the murder.

16 *David Paul's (Paul) statement*

17 Paul told police he was not sure of the date of the barbeque but he knew that Alcox was there  
18 between 3:00 p.m. and 3:30 p.m. He did not know what happened after 4:30 p.m.

19 While the AG acknowledges there are discrepancies between the alibi witnesses' accounts of  
20 Alcox's whereabouts on the night of the murder, he states that two witnesses definitively place Alcox  
21 at a location other than the Lompoc Motel at the time of the murder - Santos and Robb. The AG then  
22 contends that, even assuming one of these witnesses was wrong, Alcox is still innocent as he would  
23 not have been at the motel that night. In addition, the AG notes the absence of witnesses who could  
24 place Alcox anywhere near the Lompoc Motel on the night of the murder, as well as the absence of  
25 physical evidence that might connect him with the crime. Finally, the AG asserts that, in his January  
26 2017 interview with Alcox, Alcox was able to clearly remember his whereabouts on the night of the  
27 murder and repeated "in detail" the same story he told Lothery's investigator the month after he made  
28 his confession.



1 verified he was the caller. Sanjay was then brought in to the police station where he repeatedly denied  
2 making the phone call.

3 iii. Coleman, Fritz, and Fritz's family

4 The AG contends the statements of Coleman, Fritz, and Fritz's family deserve no weight  
5 because they lack credibility.<sup>96</sup>

6 iv. Lothery

7 The AG contends that, in light of Lothery's different versions of the murder, as well as the  
8 physical evidence that contradicts his final account of the murder, Lothery lacks credibility, as well.  
9 That being said, the AG asserts that the falsity of the Lothery's statements do not necessarily implicate  
10 Alcox.

11 **DETERMINATION OF ISSUES**

12 Penal Code section 4900 allows any person who has been erroneously convicted and  
13 imprisoned for a felony offense to apply for compensation from the CalVCB. The CalVCB must  
14 recommend compensation to the Legislature, without conducting a hearing, if the claimant was found  
15 by a court to be actually innocent by a preponderance of evidence in a proceeding for a declaration of  
16 actual innocence or a motion to vacate the judgment.<sup>97</sup> The CalVCB must also recommend  
17

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18  
19 <sup>96</sup> Fritz's mother (Rubye Fritz) and brother (Ernie Roderick Fritz) told police during the investigation that  
20 Sanjay had been at their residence from approximately 5:35 p.m. to at least 10:00 p.m. on the night of  
21 the murder. However, during Lothery's trial, Ernie Fritz testified Sanjay had actually arrived at their  
22 home at approximately 6:45 p.m. and Rubye Fritz testified she first saw Sanjay at the residence at  
23 approximately 7:00 p.m. For her part, Junia Fritz had refused to cooperate with police during the  
24 investigation. She subsequently testified at Lothery's trial and implicated Sanjay, stating he arrived at  
25 her home at approximately 6:45 p.m. and asked her to hide a gun. In addition to the discrepancies  
26 between their accounts of Sanjay's whereabouts, which may have been instigated by the fact that Fritz  
27 and Sanjay ended their relationship sometime after the murder but before Lothery's trial, the AG notes  
28 that each of the Fritz's had criminal records which raises additional issues as to their credibility.

While Coleman told police Sanjay had confessed to him, he later recanted that statement. Although  
Coleman stated that Sanjay had provided him with details of Patel's injuries, that information was  
common knowledge in the community due to newspaper accounts and word of mouth.

<sup>97</sup> § 4902, subd. (a) [referring to §§ 851.865 and 1473.6].

1 compensation, without conducting a hearing, if a court grants a contested habeas petition based upon a  
2 finding that the claimant is factually innocent.<sup>98</sup>

3 Otherwise, the CalVCB may recommend compensation after a hearing only if the claimant  
4 proves by a preponderance of the evidence that: 1) the crime with which he was charged was either  
5 not committed at all, or, if committed, was not committed by him and 2) he sustained an injury through  
6 his erroneous conviction and imprisonment.<sup>99</sup> “Preponderance of the evidence” means evidence that  
7 has more convincing force than that opposed to it.<sup>100</sup> If the claimant satisfies this burden of persuasion,  
8 then the CalVCB shall recommend to the Legislature an award of compensation equal to \$140 per day  
9 for every day spent in custody.<sup>101</sup> The AG may introduce evidence in opposition to the claim.<sup>102</sup>

10 CalVCB hearings are not governed by traditional rules of evidence.<sup>103</sup> Instead, the CalVCB may  
11 consider the “claimant’s denial of the commission of the crime; reversal of the judgment of conviction;  
12 acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant of the  
13 crime....”<sup>104</sup> However, none of these circumstances may be deemed sufficient evidence to warrant a  
14 recommendation for compensation “in the absence of substantial independent corroborating evidence  
15 that claimant is innocent of the crime charged.”<sup>105</sup> The CalVCB may also “consider as substantive  
16  
17  
18

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19 <sup>98</sup> § 1485.55, subd. (a).

20 <sup>99</sup> §§ 4903, subd. (a), 4904; *Tennison v. Victim Compensation and Government Claims Board* (2006)  
21 152 Cal.App.4th 1164.

22 <sup>100</sup> *People v. Miller* (1916) 171 Cal. 649, at p. 652.

23 <sup>101</sup> § 4904.

24 <sup>102</sup> § 4903, subd. (a).

25 <sup>103</sup> See Cal. Code Regs., tit. 2, § 615.1, subd. (a) [“The formal hearing provisions of the Administrative  
26 Procedure Act ... do not apply”].

27 <sup>104</sup> Cal. Code Regs., tit. 2, § 641, subd. (a).

28 <sup>105</sup> Cal. Code Regs., tit. 2, § 641, subd. (a).



1 evidence the prior testimony of witnesses [that] claimant had an opportunity to cross-examine, and  
2 evidence admitted in prior proceedings for which claimant had an opportunity to object.”<sup>106</sup>

3 Ultimately, all relevant evidence is admissible in a CalVCB hearing “if it is the sort of evidence  
4 on which reasonable persons are accustomed to rely in the conduct of serious affairs,”<sup>107</sup> even if a  
5 common law or statutory rule “might make its admission improper over objection in any other  
6 proceeding.”<sup>108</sup> The CalVCB “may also consider any other information that it deems relevant to the  
7 issue before it.”<sup>109</sup>

8 Nevertheless, the CalVCB’s broad authority to consider all relevant evidence when deciding a  
9 claimant’s application for compensation is expressly limited by section 4903. Specifically, subdivision  
10 (b) of that section provides:

11 the factual findings and credibility determinations establishing the  
12 court’s basis for granting a writ of habeas corpus, a motion for new  
13 trial pursuant to Section 1473.6, or an application for a certificate  
14 of factual innocence as described in Section 1485.5 shall be  
15 binding on the Attorney General, the factfinder, and the board.<sup>110</sup>

16 In *Madrigal*, the Second District Court of Appeal considered the meaning of this subdivision in  
17 section 4903, in combination with former sections 1485.5 and 1485.55.<sup>111</sup> At that time, former section  
18 1485.5 provided that express factual findings by a court, rendered in an uncontested judicial  
19 proceeding, were binding upon the CalVCB.<sup>112</sup> By comparison, former section 1485.55 provided that,  
20 in a contested judicial proceeding, the CalVCB was bound by a court’s determination that either the

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21 <sup>106</sup> Cal. Code Regs., tit. 2, § 641, subd. (b).

22 <sup>107</sup> Cal. Code Regs., tit. 2, § 641, subd. (c).

23 <sup>108</sup> Cal. Code Regs., tit. 2, § 641, subd. (d).

24 <sup>109</sup> Cal. Code Regs., tit. 2, § 641, subd. (f).

25 <sup>110</sup> § 4903, subd. (b).

26 <sup>111</sup> *Madrigal, supra*, 6 Cal.App.5th at pp. 1114-1120 [analyzing former § 1485.5, subd. (c), added by  
27 Stats. 2013, ch. 800, § 2 (SB 618), eff. Jan. 1, 2014, amend. by Stats. 2014, ch. 28, eff. June 20, 2014,  
and former § 1485.55, subd. (a), (f), added by Stats. 2013, ch. 800, § 3, eff. Jan. 1, 2014].

28 <sup>112</sup> *Madrigal, supra*, 6 Cal.App.5th at p. 1114 [examining former § 1485.5, subd. (c)].

1 claimant's new evidence points unerringly to innocence or demonstrates innocence by a  
2 preponderance of evidence; in either scenario, the CalVCB was required to grant the application  
3 without a hearing.<sup>113</sup> But for the majority of claimants who did not fall within either of these statutes  
4 (i.e., there was a contested judicial proceeding that did not result in a finding of actual innocence or  
5 evidence that unerringly pointed to innocence), section 4903 applied.<sup>114</sup> Under section 4903, "the  
6 factual findings and credibility determinations establishing the court's basis for granting a writ of habeas  
7 corpus" are "binding on" the CalVCB.<sup>115</sup>

8 *Madrigal* confirmed that binding determinations under Penal Code section 4903 are not limited  
9 to issues involving actual innocence. Rather, the binding effect extends to any factual determination  
10 supporting the legal basis for granting habeas relief.<sup>116</sup> For example, section 4903 applied to the  
11 federal court's factual finding that Madrigal's proffered alibi witness was "credible" and "strong"  
12 because this finding supported the decision to grant habeas relief for ineffective counsel.<sup>117</sup> On the  
13 other hand, section 4903 did not apply to the federal court's finding that Madrigal was "actually  
14 innocent" because that finding occurred in the course of a bail hearing.<sup>118</sup> *Madrigal's* construction of  
15 section 4903 "ensure[d] consistency between the Board's determinations and the factual findings  
16 made in post-conviction relief proceedings, including those not based on actual innocence."<sup>119</sup>

17 The result in *Madrigal* is bolstered by recent amendments to sections 1485.5 and 1485.55.  
18 Specifically, subdivision (c) of section 1485.5 currently provides:

19 In a contested or uncontested proceeding, the express findings  
20 made by the court, including credibility determinations, in  
21 considering a petition for habeas corpus, a motion to vacate

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22 <sup>113</sup> *Id.* at p. 1115 [examining former § 1485.55, subds. (a), (f)].

23 <sup>114</sup> *Id.* at pp. 1118-1119 [examining § 4903, subd. (b)].

24 <sup>115</sup> § 4903, subd. (b).

25 <sup>116</sup> *Madrigal, supra*, 6 Cal.App.5th at pp. 1118-1119.

26 <sup>117</sup> *Id.* at pp. 1112 & 1119.

27 <sup>118</sup> *Id.* at p. 1120.

28 <sup>119</sup> *Id.* at p. 1119.

1 judgment pursuant to Section 1473.6, or an application for a  
2 certificate of factual innocence, shall be binding on the Attorney  
3 General, the factfinder, and the California Victim Compensation  
4 Board.<sup>120</sup>

5 Subdivision (d) defines “express factual findings” as “findings established as the basis for the court’s  
6 ruling or order.”<sup>121</sup> Subdivision (e) clarifies that the court may be either state or federal.<sup>122</sup> Thus,  
7 section 1485.5 confirms that the CalVCB is bound by any factual determination necessary to support a  
8 court’s decision to grant habeas relief.

9 As for the current version of section 1485.55, it continues to require that the CalVCB  
10 automatically recommend compensation without a hearing “if the court has found that the person is  
11 factually innocent” in a proceeding for habeas relief or to vacate the judgment.<sup>123</sup> Section 1485.55  
12 merely specifies the procedures by which an applicant may seek such a determination.<sup>124</sup>

13 In light of the foregoing authority, the CalVCB is bound by a federal court’s factual findings and  
14 credibility determinations made when granting a habeas petition, even if those findings do not establish  
15 actual innocence.<sup>125</sup> Nevertheless, as explained below, Alcox’s application is recommended for denial  
16 because he has failed to prove by a preponderance of the evidence that he is innocent of felony  
17 murder.

#### 18 **I. No Court Has Found Alcox To Be Innocent As Required For Automatic Compensation**

19 The current version of section 1485.55, which became effective January 1, 2017, requires a  
20 judicial finding that “the claimant is factually innocent,” whereas the former version permitted a judicial  
21 finding that the “new evidence on the petition points unerringly to innocence....” The current version

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22 <sup>120</sup> § 1485.5, subd. (c), most recently added by Stats. 2016, ch. 31, § 244 (SB 836), eff. Jun. 27, 2016,  
23 amend. by Stats. 2016, ch. 785 § 2 SB 1134), eff. Jan. 1, 2017.

24 <sup>121</sup> § 1485.5, subd. (d).

25 <sup>122</sup> § 1485.5, subd. (e).

26 <sup>123</sup> § 1485.55, subds. (a)-(f), amended by Stats. 2016, ch. 31, § 245 (SB 836), eff. Jun. 27, 2016, and  
27 by Stats. 2016, ch. 785, § 3 (SB 1134), eff. Jan. 1, 2017.

28 <sup>124</sup> *Ibid.*

<sup>125</sup> See *Madrigal, supra*, 6 Cal.App.5th at pp. 1117-1119; §§ 1485.5, subd. (c), 4903, subd. (b).

1 of section 1485.55 applies to the resolution of Alcox's application, even though it was filed before this  
2 statutory amendment was enacted.<sup>126</sup> Because no state or federal court has found Alcox to be  
3 factually innocent, it necessarily follows that he is not entitled to automatic compensation.

4 Even if the former version of section 1485.55 were applicable to Alcox's application, he is still  
5 not entitled to automatic compensation because no court ever found that his asserted "new" evidence  
6 points unerringly to innocence. Instead, the magistrate judge concluded that Alcox had a "viable  
7 defense" and that, *had it been presented to the jury*, "there is a reasonable likelihood of a more  
8 favorable outcome."<sup>127</sup> But a finding that a defendant is "not guilty" is not at all equivalent to a finding  
9 that he is innocent – the standard required for compensation under the erroneously convicted  
10 offender laws.

11 A. Binding effect of district court's 2016 decision

12 In his application, Alcox contends that the magistrate judge made "exhaustive factual findings  
13 and credibility determinations" that are binding on the Board pursuant to section 4903, subdivision  
14 (b). On the basis of *Madrigal*, which he notes has a similar procedural history, he asserts that these  
15 factual findings and credibility determinations, made in the context of an ineffective assistance of  
16 counsel claim, establish his innocence by a preponderance of the evidence. Accordingly, he  
17 contends that the Board must make a recommendation that compensation be granted.

18 Like *Madrigal*, Alcox challenged his conviction by way of petition for writ of habeas corpus and  
19 the court granted the petition on the ground of ineffective assistance of counsel. In order to prove a  
20 claim of ineffective assistance of counsel, a habeas petitioner must show that: 1) defense counsel's  
21 performance was deficient in that it fell below an objective standard of reasonableness and 2) the  
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25 <sup>126</sup> See *Tennison, supra*, 152 Cal. App. 4th at pp. 1181-1182 [finding "application for monetary  
26 compensation pursuant to section 4900 is neither fundamental nor vested" right because the "right to  
27 obtain compensation does not vest until a claimant persuades the Board on the merits of the  
28 application"]; see also *Madrigal, supra*, 6 Cal.App.5th at p. 1115, n.6 [retroactively applying clarifying  
amendment from 2014 to Penal Code section 1485.5].

<sup>127</sup> *Alcox v. Beard, supra*, 2015 U.S. Dist. LEXIS at p. 87.

1 deficiency prejudiced the defense.<sup>128</sup> In ruling that a petitioner received ineffective assistance of  
2 counsel, a magistrate judge is simply finding that, absent defense counsel's unprofessional errors,  
3 there is a reasonable probability the result of the criminal trial would have been different.<sup>129</sup> Such a  
4 ruling does not require a finding of actual innocence. Thus, when the magistrate judge in Alcox's case  
5 made findings concerning the weakness of the prosecution's case and the strength of Alcox's alibi  
6 evidence, he did so in the context of determining whether Alcox had been prejudiced by his trial  
7 lawyer's deficient performance. The magistrate judge made no finding of actual innocence.

8 Nevertheless, the Board cannot ignore a district court's findings, even if they do not establish  
9 actual innocence, and must give them binding effect. To the extent the district court made factual  
10 findings in Alcox's case, those findings do not establish Alcox's innocence of felony murder by a  
11 preponderance of the evidence for the following reasons.

12 1) Felony Murder

13 Murder is defined as "the unlawful killing of a human being, or a fetus, with malice  
14 aforethought."<sup>130</sup> The crime of murder is divided into two types: first degree, which requires some  
15 additional elements such as being committed during the perpetration of, or attempt to perpetrate a  
16 robbery or a burglary; and second degree, which does not include those additional elements.<sup>131</sup> In  
17 addition, a defendant may also be found guilty of murder under the felony-murder rule. The felony-  
18 murder rule makes a killing that occurs during the commission of certain felonies, such as robbery and  
19 burglary, murder, without the necessity of further examining the defendant's mental state. This liability  
20 extends beyond the perpetrator who actually pulled the trigger and applies to each accomplice when  
21 the murder occurs while the killer was acting in furtherance of a criminal purpose common to himself  
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24 <sup>128</sup> *Strickland v. Washington* (1984) 466 U.S. 668, at p. 687; *Wiggins v. Smith* (2003) 539 U.S. 510, at  
25 p. 521.

26 <sup>129</sup> *In re Welch* (2015) 61 Cal.4th 489, at p. 517.

27 <sup>130</sup> § 187, subd. (a).

28 <sup>131</sup> § 189.

1 and the accomplice, or while the killer and the accomplice were jointly engaged in the felonious  
2 enterprise.<sup>132</sup>

3 2) Asserted findings by magistrate judge

4 Alcox contends that the magistrate judge made factual findings which he asserts establish  
5 actual innocence. Specifically, he points to the following statements set forth on pages six and seven  
6 of the decision:

- 7 - Alcox's confession was the result of coercive police techniques that resulted in a false  
8 confession;
- 9 - Alcox was, as he told the police, at Hughes's house at the time of the crime;
- 10 - the other persons whom Gonzales claimed participated in the conversation in  
11 the alley denied that the conversation took place;
- 12 - the complete recorded jailhouse conversations between [Alcox] and Lothery  
13 (as compared to Seilhamer's testimony about a portion of the conversations)  
14 were exculpatory and confirmed that [Alcox] had falsely confessed;
- 15 - Sanjay, who not only had called the police in an attempt to confess to the  
16 murder but who also told at least one other person that he shot the victim,  
17 was identified as the shooter by the victim.

18 Assuming, arguendo, that these statements constitute factual findings in the *Madrigal* sense,  
19 they fall short of establishing actual innocence. At best, they show that there was significant evidence  
20 available on each of the above points that defense counsel *could have presented in an attempt to*  
21 *establish a viable defense*; however, these findings, whether viewed individually or collectively, are not  
22 equivalent to a finding of actual innocence, nor do they establish actual innocence by a preponderance  
23 of the evidence. Significantly, the findings were made in the context of an ineffective assistance of  
24 counsel claim and formed the basis for the magistrate judge's conclusion that Alcox was prejudiced by  
25 his attorney's failure to investigate and present this evidence; nothing more. In ruling that Alcox  
26 received ineffective assistance of counsel, the magistrate judge was simply finding that, absent defense

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28 <sup>132</sup> *People v. Pulido* (1997) 15 Cal.4th 713, at p. 728.

1 counsel's unprofessional errors, there is a reasonable probability the result of the criminal trial would  
2 have been more favorable – a ruling that does not require a finding of actual innocence.

3 a) Alcox's confession was the result of coercive police techniques  
4 that resulted in a false confession

5 That there was "significant evidence" available that could have been used to show law  
6 enforcement utilized coercive techniques that resulted in Alcox making a false confession does not  
7 constitute a finding that Alcox is actually innocent of the murder. Nor does it constitute a finding that  
8 Alcox actually made a false confession. Rather, the magistrate judge's finding was that, had this  
9 evidence been presented, there is a reasonable probability the jury would have reached a different  
10 conclusion – that the confession was false. Had the jury reached such a conclusion, they most likely  
11 would have found Alcox not guilty as the confession was the keystone of the prosecution's case.  
12 However, it is important to remember that a finding of not guilty does not equate to a finding of actual  
13 innocence – the standard that Alcox must satisfy, by a preponderance of the evidence, in order to be  
14 eligible for CalVCB compensation.

15 b) Alcox was, as he told the police, at Hughes's house at the time of  
16 the crime

17 Likewise, the existence of significant evidence that *could have been used* to show that Alcox  
18 was at Hughes's house at the time of the murder does not constitute a finding that Alcox was, in fact, at  
19 Hughes's house when the victim was killed. Police interviewed a number of individuals who asserted  
20 they were at Hughes' party the night of the murder. Some of them placed Alcox at the party during the  
21 time the murder was committed; some said he was not there at all; and others stated that, while he was  
22 there at some point, he did not arrive until after the murder had been committed. Even Alcox's own  
23 accounts of his whereabouts changed significantly from one telling to the next and do not affirmatively  
24 establish that he was at the party, or anywhere other than the motel, when Patel was shot at  
25 approximately 6:40 p.m. on February 16, 1986.

26 i) Alcox's statements

27 During his interrogation on March 23, 1986, Alcox told police he was at Hughes's house all day  
28 on the date of the murder and spent the night there, as well. He then identified a number of individuals

1 who were also present: Hughes, Santos, Chuck, Robb, and Hamel, Daugherty, Paul, Webb, and  
2 Cornelison. When Alcox was interviewed a month later by an investigator working for Lothery, Alcox  
3 said he was at Robb's house between 3:30 p.m. and 4:00 p.m. Then he, Robb, and Hamel went to  
4 Hughes's house between 6:00 p.m. and 7:00 p.m. He stated he could not remember whether he spent  
5 the night because he was drinking a lot at that time and had a bad memory.

6 Eighteen years later, in 2004, during the state evidentiary hearing on his habeas petition, Alcox  
7 testified that he did not remember where he was the night of the murder. He stated he had consumed  
8 a lot of alcohol and drugs (marijuana, cocaine, and LSD) during the time period surrounding the  
9 murder, and often experienced black outs which left him without any memory of what he had been  
10 doing while he was under the influence. As to what he told police during his interrogation in 1986,  
11 Alcox testified he told them he was at Hughes's house because he spent a lot of his time there and  
12 thought it was likely he was there at the time of the murder. When questioned about his certainty,  
13 Alcox stated that, at the time he spoke with police, he had been sure of his whereabouts the night of the  
14 murder. However, he also testified that, in light of his substance abuse around the time of the murder,  
15 he could not really say where he had been because "one day really blurred into the next." When  
16 specifically asked whether he had been involved in the murder in any way, Alcox stated he was not and  
17 that he would have remembered an event that significant.

18 When the AG spoke with Alcox in January 2017, 31 years after the shooting, Alcox stated he  
19 was staying at Hughes's house the day of the murder. He and Hughes had planned a party for the  
20 evening the murder was committed and "they went to Lompoc to gather some friends for the party."  
21 There is no detailed description of Alcox's activities or whereabouts after that. The only mention of the  
22 murder itself was when the Special Agent assisting the AG asked Alcox who he thought committed the  
23 murder. Alcox responded that he did not know because he was not there and stated that his  
24 understanding of the murder was based on what Lothery told him while they were incarcerated  
25 together.

## 26 ii. Lothery's statements

27 The evidence shows that Lothery was one of the individuals who participated in the murder.  
28 Not only was he seen at the motel right after the shooting, but he has repeatedly acknowledged his



1 presence when the shots were fired and neither party has suggested otherwise. Lothery was  
2 ultimately convicted of the murder and remains in prison for his role in this crime.<sup>133</sup>

3 Although Lothery repeatedly asserted that Alcox was not involved, he has provided several  
4 different accounts of his participation in the crime so as to bring his credibility into question. Initially,  
5 he described himself as a passerby who heard gunshots and saw the victim exit a motel room. After  
6 Alcox confessed and implicated him, Lothery told police that his prior statement was false, that he did  
7 not arrive at the motel until after the first responders were on the scene, and that he was alone at the  
8 time. When he spoke with police at a later date, he again stated he was just passing by the motel  
9 when he heard a gunshot; however, he revised his story to say that he had seen Sanjay either running  
10 or walking away from the motel's office. Much later, at Alcox's state evidentiary hearing, Lothery  
11 testified that he was with Sanjay on the date of the murder. At some point, they decided to steal some  
12 alcohol; however, they subsequently decided to go to the motel to sell the victim a drill that Sanjay was  
13 carrying in a paper bag. After they arrived at the motel, Lothery stayed in the office near the door  
14 while Sanjay went to the counter. Sanjay and the victim argued in a language that Lothery did not  
15 understand and the victim threw money at Sanjay. Sanjay pulled out a gun, pointed it at the victim,  
16 and fired. Lothery claimed he was unaware Sanjay was armed when they entered the motel. Most  
17 recently, in January 2017, when Lothery was interviewed by the AG, he essentially reiterated this  
18 testimony; however, he made no indication as to when he learned that Sanjay had a gun and, in fact,  
19 was never asked that specific question.

20 In light of Lothery's varying accounts of the murder, as well as his evolving description of his  
21 own role to that of an innocent bystander, the courts have repeatedly found him to lack credibility.  
22 Significantly, the superior court in which the state evidentiary hearing was held in 2005 specifically  
23 found that Lothery was not a credible witness in light of his constantly changing version of the crime.  
24 Specifically, the superior court stated that, "[h]is demeanor while testifying and selective memory

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25 <sup>133</sup> Lothery has a significant criminal history that pre-dates the murder. He has also continued his  
26 criminal behaviors and failure to follow rules throughout his incarceration. As of December 2009, when  
27 he appeared before the Board of Parole Hearings for his Parole Eligibility Hearing, he had accumulated  
28 58 Rules Violation Reports in prison for offenses ranging from possession of alcohol to battery with a  
weapon.

1 concerning the events makes his testimony suspect.”<sup>134</sup> More recently, the district court found in its  
2 2009 decision addressing the issue of timeliness, that Lothery’s statements were unreliable.<sup>135</sup> While  
3 the district court acknowledged that it was required to defer to the superior court’s credibility findings,  
4 the district court stated it would have found Lothery’s declaration and evidentiary hearing testimony  
5 inherently unreliable in any event.

6 Accordingly, Lothery’s statements have little to no value in establishing Alcox’s innocence.

7 iii. Alibi witnesses

8 A number of individuals have weighed in on Alcox’s whereabouts at the time of the murder.  
9 Many of these witnesses either said Alcox was not at the party at Hughes’s house or stated they could  
10 not verify his presence at the time the murder was committed. While there are two witnesses who  
11 claim to have been with Alcox at the relevant time, they “were not inherently more credible or reliable”  
12 than the ones who did not see petitioner there.”<sup>136</sup> Accordingly, there are too many flaws between  
13 these various accounts to positively establish Alcox’s alibi for the time of the murder.

14 c) The other persons whom Gonzales claimed participated in the  
15 conversation in the alley denied that the conversation took place

16 Gonzales testified that she and several others were present in the alley behind Alcox’s home  
17 two weeks after the murder and overheard him make inculpatory statements to Garcia. That the other  
18 witnesses who were present in the alley two weeks after the murder denied that the conversation took  
19 place or that Alcox was even present does not constitute evidence that he is actually innocent of the  
20 crime charged. Rather, the witnesses’ statements are evidence that *could have been used to*  
21 challenge Gonzales’s credibility and the overall strength of the prosecution’s case.

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24 <sup>134</sup> AG’s Exhibit 78, at p. 2501.

25 <sup>135</sup> As noted by Alcox’s counsel, this district court decision was subsequently overturned; however, it  
26 was overturned on the issue of due diligence and not Alcox’s claim of actual innocence.

27 <sup>136</sup> *Alcox v. Beard, supra*, 2015 U.S. Dist. LEXIS, at p. 42. While this quote was used by the magistrate  
28 judge in referring to the credibility of the witnesses who did not recall seeing Alcox at Hughes’s party, it  
applies equally to those who stated they *were* with Alcox at the time of the murder.

1 d) The complete recorded jailhouse conversations between [Alcox]  
2 and Lothery (as compared to Seilhamer's testimony about a  
3 portion of the conversations) were exculpatory and confirmed that  
4 [Alcox] had falsely confessed

5 It is inarguable that the magistrate judge's conclusion that Seilhamer's testimony, "at best,  
6 was an incomplete account of the conversation, and at worst, amounted to a complete  
7 mischaracterization of the conversation" is a finding that is binding on the CalVCB.<sup>137</sup> However, that  
8 portions of these conversations were potentially exculpatory in nature and *could have been used* to  
9 support a defense argument that Alcox's confession was false is not a finding of actual innocence.  
10 Rather, the magistrate judge's finding was that there was significant evidence that could have been  
11 presented to challenge Seilhamer's credibility testimony and bolster an assertion by the defense that  
12 Alcox lied in confessing to the crime. But even if this evidence had been presented to a jury, it is not  
13 a foregone conclusion they would have found any or all of the dialogue to be exculpatory and rejected  
14 Seilhamer's testimony. As noted by the superior court who heard the testimony and observed the  
15 witness's demeanor, "[i]t is also possible to read them to suggest that Alcox would falsely retract his  
16 true confession."<sup>138</sup> Finally, assuming, for the sake of argument, that the jury would reject  
17 Seilhamer's testimony and view the recorded conversations as exculpatory, there is still the possibility  
18 they would have convicted Alcox given his confession.

19 e) Sanjay – who not only had called the police in an attempt to  
20 confess to the murder but who also told at least one other person  
21 that he shot the victim – was identified as the shooter by the victim

22 That there is significant evidence that *could have been used* to show that Sanjay was the  
23 shooter does not establish that Alcox was actually innocent. In fact, the magistrate judge did not find  
24 that Alcox was actually innocent or that he was in no way involved in the burglary and robbery that led  
25 to the murder. Because felony murder extends criminal liability to each accomplice involved in a felony  
26 in the event someone is killed during the commission of that felony, Alcox did not need to actually hold

27 <sup>137</sup> *Alcox v. Beard, supra*, 2015 U.S. Dist. LEXIS at p. 63.

28 <sup>138</sup> AG's Exhibit 78, at p. 2503.

1 the gun or pull the trigger to be guilty. Rather, he only needed to have been an accomplice to the  
2 burglary and robbery that resulted in the victim's death. Because the magistrate judge's finding does  
3 not exclude the possibility that Alcox was an accomplice to the burglary and robbery, it does not  
4 establish actual innocence.

5 In conclusion, had defense counsel presented evidence to establish the above points, there is a  
6 reasonable probability that the jury could have reached a different verdict. However, that the  
7 magistrate judge found there to be "significant evidence" of each one does not mean that the jury would  
8 agree with any or all of them. As the fact-finder in a criminal trial, the jury is ultimately responsible for  
9 making the decision as to the credibility and weight of each witness and each piece of evidence. And it  
10 is important to remember that a jury verdict of "not guilty" is not the same as actual innocence. In the  
11 absence of a showing by a preponderance of the evidence that he is actually innocent, Alcox is not  
12 eligible for compensation as an erroneously convicted felon.

13 While the AG has conceded to Alcox's section 4900 claim, the Board is aware that the State of  
14 California has repeatedly fought Alcox's numerous attempts to obtain relief from his conviction and filed  
15 objections to the magistrate judge's 2015 findings and recommendations prior to the district court's  
16 adoption of the opinion. In addition, while the DA elected not to retry Alcox, the Office did not cite  
17 actual innocence as one of the reasons for this decision. Rather, the DA's Office decided to forgo a  
18 retrial because Alcox "had completed his prison term, was not the shooter, and a re-trial on an almost  
19 30-year old case would take resources from other prosecutions."

## 20 **II. Every Court in Which Alcox's Actual Innocence Claim Was Considered Rejected It**

21 As previously stated, in order for an actual innocence claim to be credible, the claimant must:  
22 1) produce new reliable evidence that was not presented at trial and 2) show that it was more likely  
23 than not that no reasonable juror would have found him guilty beyond a reasonable doubt.<sup>139</sup> In other  
24 words, the new reliable evidence must establish "factual innocence, not mere legal insufficiency."<sup>140</sup>

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27 <sup>139</sup> *Schlup v. Delo, supra*, 324, at pp. 326-327.

28 <sup>140</sup> *Bousley v. United States* (1998) 523 U.S. 614, at pp. 623-624.

1 Throughout his lengthy habeas proceedings at both the state and federal levels Alcox has  
2 repeatedly claimed he is actually innocent of the murder and every court that has considered the  
3 merits of his claim has rejected it.<sup>141</sup>

4 **III. Alcox has not demonstrated actual innocence by a preponderance of the evidence**

5 In bringing his claim before the Board, Alcox has not presented any new evidence that was not  
6 previously raised and considered by the superior court, the appellate court, and the district court. In  
7 fact, the only “new” evidence before the Board or, more accurately “newly presented” evidence, is the  
8 AG’s January 2017 interviews with Alcox and Lothery.

9 Lothery told the AG that he and his friend Sanjay went to a store where Lothery stole some  
10 alcohol. After drinking in the nearby park, they went to the motel so Sanjay could sell a drill to Patel.  
11 Lothery waited by the door while Sanjay went inside. Sanjay argued with Patel and ultimately shot  
12 him. Lothery denied that Alcox was present.

13 For his part, Alcox told the AG he had stayed at Hughes’s house the day of the murder. He  
14 and Hughes planned to have a party at that location that evening and went to Lompoc to gather their  
15 friends. Hughes’s house was approximately 10 miles away from the motel. When the AG asked Alcox  
16 who he thought committed the murder, “Alcox stated “he did not know since he was not there. His ...  
17 understanding was based on what Lothery told him after the murder, when they were incarcerated  
18 together. Alcox said he thought an acquaintance of Lothery named ‘Sanjay’ committed the murder.”

19 Lothery’s interview provides yet another account of the events leading up to the murder. Not  
20 only does he place himself with Sanjay much earlier in the day than he had previously stated, but he  
21 indicated that, prior to the murder, the two had gone to a nearby store where Lothery stole alcohol. In  
22 any event, Lothery’s credibility has repeatedly been found wanting by the courts and, thus, deserves  
23 no weight.

24 Alcox’s statement, at best, amounts to a vague, blanket denial of his role in the crime. He  
25 provided no new evidence that supports his claim he was at the party at the time of the murder. In

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27 <sup>141</sup> While the district court’s 2009 decision denying Alcox’s petition as untimely was subsequently over-  
28 turned, the sole issue for that decision was whether Alcox had exercised due diligence. The 2009  
decision, with respect to the court’s determination regarding actual innocence, was left undisturbed.

1 fact, Alcox himself does not definitively state that he was at the party at the time the murder was  
2 committed. Accordingly, it deserves little, if any weight.

3 Despite the questions raised with respect to Gonzales's and Seilhamer's testimony, we still  
4 have Alcox's confession. While evidence exists that could have been presented to challenge the  
5 credibility of that confession, there is also evidence that supports the veracity of Alcox's statements to  
6 police. In light of the evidence implicating Alcox, his assertion he is actually innocent is less than  
7 convincing, even with the more lenient, preponderance of the evidence standard.

8 Alcox admitted he was friends with Lothery and that he was with Lothery on the day of the  
9 murder. Although Alcox's whereabouts at the time of the shooting are in dispute, Alcox confessed to  
10 the crime and knew significant details about the crime that were never disclosed by, or known to,  
11 police.

12 First, Alcox stated the door he and Lothery used to enter the motel's office had a bell hanging  
13 from the top that he covered with his hand to prevent their entry from being announced. Although law  
14 enforcement had asked him whether there was a bell or a buzzer on the door, Alcox stated, without  
15 any apparent hesitation, that there had been a bell. He then accurately described the location of the  
16 bell and provided the details on how he had silenced it – details that were not known to law  
17 enforcement.

18 Second, during his second recitation of how he got out from behind the counter area after Patel  
19 entered the room, Alcox stated he had hopped over the counter before running from the building.<sup>142</sup>  
20 While he also told law enforcement that he ran around the counter, the physical aspects of the scene,  
21 including Patel's presence, would have prevented him from doing so. Because the area behind the  
22 counter was extremely narrow, it did not easily accommodate two people. The only way out of the  
23 area behind the counter was to run into the living quarters or through the pass-through portion of the  
24 counter.<sup>143</sup> Patel's presence in that area would have virtually blocked the assailant's ability to run in

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26 <sup>142</sup> AG's Exhibit 26, at p. 190.

27 <sup>143</sup> AG's Exhibit 57, at p. 1544.  
28

1 either direction.<sup>144</sup> While Alcox admitted he pushed Patel with his forearm in his attempt to escape, he  
2 also told law enforcement that Patel was not forced back into the living quarters by the shove, thereby  
3 leaving him in the walkway area behind the counter, blocking both potential exits. Therefore, the  
4 assailant who was behind the counter with his hand in the money drawer when Patel confronted him  
5 undoubtedly needed to hop over the counter to escape. This conclusion is supported by the  
6 prosecuting attorney's closing arguments at trial. While drawing the jury's attention to a diagram that  
7 had been admitted into evidence, DDA Wright contended that even though the pass-through portion of  
8 the counter was still open, there was not enough room for the assailant to escape because Patel's  
9 body was blocking the way.<sup>145</sup>

10 Third, Alcox identified the gun that the shooter used to kill Patel as a revolver similar to the one  
11 carried by Sergeant Heidt. While he made his identification on the basis of only two weapons that  
12 were shown him, he went on to describe the dark coloring of the barrel and the lighter coloring of the  
13 grip, and stated he was "positive" in his identification. That law enforcement did not find any shell  
14 casings at the scene of the murder or mention that fact to Alcox further supports Alcox's identification  
15 of the murder weapon as a revolver.<sup>146</sup>

16 Fourth, Alcox stated he was aware Lothery had a gun before they entered the motel's office.  
17 He then volunteered that Lothery had shown it to him near the dumpsters and marked the exact  
18 location on the hand-drawn sketch of the motel used during his interrogation.<sup>147</sup> He then described the  
19 location where Lothery was carrying the weapon - tucked into the waistband of his pants, in the back.  
20  
21

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22 <sup>144</sup> Even if Patel's body had not completely blocked the path of escape, the assailant would have been  
23 forced to go well within Patel's reach to get by – a situation that would have placed the assailant at  
24 great risk of physical confrontation and potential capture.

25 <sup>145</sup> AG's Exhibit 59, at pp. 1873-1874.

26 <sup>146</sup> Revolvers do not eject the shell casings while semi-automatic weapons do. (See:  
27 <http://science.howstuffworks.com/semi-automatic-weapon-vs-machine-gun.htm> and  
28 <http://science.howstuffworks.com/revolver2.htm> [last accessed on July 12, 2017].)

<sup>147</sup> AG's Exhibit 28.

1 Fifth, Alcox identified on the hand-drawn sketch of the motel the door he and Lothery used to  
2 enter the office and the path he used to leave – neither of which were mentioned by law enforcement  
3 prior to his confession. While this was the only door leading into the office area directly from the  
4 outside, there was at least one other door that led into the living residence from the outside that could  
5 have been accessed to get into the motel's office.

6 In addition, Alcox did not just accept as true whatever the two officers stated during the  
7 interrogation and corrected several of their misstatements. While Sergeant Heidt was attempting to  
8 clarify the sequence of events after Lothery and Alcox entered the office, he stated that Lothery had  
9 entered the motel first and gone behind the counter. Alcox corrected him and stated that he (Alcox)  
10 had gone behind the counter while Lothery stood watch on the customer's side of the counter.<sup>148</sup>  
11 When Investigator Ast questioned Alcox about the two pieces of the pass-through portion of the  
12 countertop that he would have had to open before he could go behind the counter and access the  
13 money drawer, Alcox volunteered that the lower portion of the counter was already open.<sup>149</sup> When  
14 Investigator Ast asked Alcox whether he hit Patel in order to make his escape, Alcox stated he had  
15 pushed Patel with his forearm.<sup>150</sup> Alcox then stated that, while Patel stepped backwards, he was not  
16 forced back into the living quarters. When Investigator Ast asked Alcox about whether he saw the gun  
17 was in the shooting position as he was running out of the office, Alcox stated Lothery was holding it in  
18 his right hand; however it was not pointed at Patel at that time.<sup>151</sup> Alcox subsequently clarified that  
19 Lothery had been holding the gun down by his side.<sup>152</sup>

20 Further, Alcox made statements to Lothery while the two were housed in neighboring cells in  
21 the main jail that support his confession. While there are statements that could be viewed as  
22 exculpatory, he also made statements that could be inculpatory. As noted by the superior court judge

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24 <sup>148</sup> AG's Exhibit 26, at p. 186.

25 <sup>149</sup> AG's Exhibit 26, at p. 194.

26 <sup>150</sup> AG's Exhibit 26, at p. 195.

27 <sup>151</sup> AG's Exhibit 26, at p. 196.

28 <sup>152</sup> AG's Exhibit 26, at p. 209.



1 who presided over Alcox's state evidentiary hearing, "[i]t is also possible to read [the statements] to  
2 suggest that Alcox would falsely retract his true confession." Indeed, one wonders why Alcox would  
3 have expressed concern about whether Sanjay would "try to put some story on us" unless Lothery and  
4 Alcox were involved in the murder together. More significantly, Sergeant Heidt opined that the  
5 conversations were staged. While he did not expressly state his reasoning for this conclusion, he  
6 testified that he had reviewed the jail's records and determined that Sanjay was not in custody at the  
7 time Lothery and Alcox were discussing Sanjay's alleged presence in the jail – a fact which suggests  
8 that Lothery and Alcox were lying during their conversations in an attempt to cast the spotlight of  
9 suspicion and blame on another individual.

10 Finally, as noted by the AG, it should not be forgotten that a freely given confession ranks  
11 among the most powerful evidence of guilt. While there is evidence that could have been presented at  
12 trial to challenge Alcox's confession, the existence of that evidence does not equate to a finding that  
13 the confession was, in fact, false such that Alcox admitted to committing a crime he did not do.  
14 Indeed, the state superior court expressly found that the confession was voluntary and not coerced,  
15 and no court has concluded otherwise. Notably, the magistrate judge who determined there was  
16 evidence that could have been presented to show the confession was the result of coercive police  
17 techniques that resulted in a false confession did not make a finding that the confession was either  
18 coerced or false. It is also of note that the AG, who conducted what Alcox's attorney describes as an  
19 "extensive" review, determined that Alcox's confession was voluntary and not coerced, his final  
20 conclusion regarding Alcox's actual innocence claim notwithstanding.<sup>153</sup>

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22  
23 <sup>153</sup> In response to the Hearing Officer's request for supplemental briefing, Alcox's counsel contended  
24 that the DA's subjective view or belief in Alcox's guilt or innocence, or any particular Deputy DA's belief,  
25 is of little or no probative value in determining the factual issue before the Board. Likewise, Alcox's  
26 counsel also contended that the DA's Office's intentions with respect to extraditing Sanjay for  
27 prosecution are also largely irrelevant to the issue before the Board. Instead, counsel contends that the  
28 DA's "objective act of dismissal should be the relevant evidence, if any, considered by the Board as to  
the view of the District Attorney." Counsel's assertions are disingenuous. Had the DA's Office or the  
Deputy DA who prosecuted Alcox expressed a belief that Alcox was innocent, rather than simply  
dismissing the case based on financial reasons and the length of time Alcox had already spent in  
prison, or stated that the Office was planning to extradite Sanjay, Alcox's counsel undoubtedly would  
have relied on that information to bolster Alcox's claim of actual innocence.

1 **CONCLUSION**

2 Based on a thorough review of the evidence, it is determined that Alcox has failed to prove, by  
3 a preponderance of the evidence, that he did not commit the crime with which he was charged,  
4 convicted, and served time for in prison. Accordingly, he is not eligible for compensation as an  
5 erroneously convicted felon.

6 Date: July 14, 2017

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8 Andrea L. Konstad  
9 Hearing Officer  
10 California Victim Compensation Board  
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1 Exhibit 1

2 The following are additional, relevant excerpts from the jailhouse conversation between Alcox  
3 and Lothery:

4 DEF [Lothery]: I just hope you can get me out.

5 J [Alcox]: No problem. I'll get you out. My Dad talked to Sgt. H....? and  
he'll get all my friends.

6 DEF: Did you tell your Dad about spending the night at ...? If you got a  
(good?) alibi, then I'm clear.

7 J: That is what I tried to tell you this morning.

8 DEF: In a way it doesn't clear me.

9 J: It will. All they have is my statement. They don't got a witness. They  
don't got shit.

10 ...

11 DEF: I just can't understand why you made up that story.

12 J: My fucking mind was blown. I woke up frying, man. Me and Chuck  
took [LSD] about 4 in the afternoon, we were up until 3 in the morning.  
When I woke up, I was still going.

13 Now I am denying it. It was a fucking lie. I got David, I got Sean, I got  
Roberta. They all fucking seen me [at Hughes's party].

14 ...

15 J: I was just shaking and shit. They played back the whole tape and I  
kept saying I don't know, I don't know.

16 J: They told me I was doing the shooting. I was freaking, man, because I  
couldn't remember what I did that weekend. I remember a barbeque on  
President's Birthday. I thought I might have blanked out. I told them  
there is no way, no way I could have done it.

17 ...

18 J:...I thought you were already in. They were bullshitting. I'll testify under  
oath. You weren't with me all weekend. That statement I made was a lie.  
They could get me for making a false statement, but that is it.

19 DEF: You got me in, now get me out.

20 J: No shit. I got me in, now I got to get me out, too.

21 ...

22 J: Yeah, my dad. My most important prospect.

23 DEF: Do me a favor when you talk to him. Tell John to go round up all  
my people. Tell him Randy, Eric...

24 ...

25 J: I have witnesses that will say I was with them the whole weekend.

26 ...

27 J: Your lawyer told me to plead not guilty.

28 DEF: Of course. Why would you plead guilty?

J: I don't know. Why would I make that stupid ass statement.

...

J: I'll tell them it's a lie.

DEF: That was very foolish.

J: I know.

1 DEF: (Says something like, you got the killer alibi, but a fucked up  
2 statement. I got the ... no statement, but no alibi.)

3 ...

4 J: The first thing I'm going to tell my lawyer is that I made a false  
5 statement. I'll just tell them I started tripping out.

6 ...

7 J: I started tripping out. I didn't know what I did that weekend.

8 Kelly [Hughes] came over with a check and said I was with him.

9 DEF: You were. You weren't even around, how could you know I was at  
10 the motel?

11 J: No shit. I got these mother fuckers who will swear I was with them the  
12 whole weekend. I'll swear I made a false statement. I was under  
13 pressure, I was shaking, I didn't have much sleep and wasn't thinking  
14 right. That is exactly what happened.

15 ...

16 DEF: I can't understand how you got your ownself in this.

17 J: Because I was freaking out, man.

18 DEF: Right after you got picked up, your brother came up to me and  
19 goes, "you told some girl that you really did do it."

20 J: Fuck that.

21 DEF: He said that "you hung out with [Alcox] until about 5 weeks ago then  
22 you thought it wouldn't be cool if you hung out together until things cooled  
23 off." I told him we hang around with different crowds – no way. If you can  
24 just prove you made a false statement.

25 J: I'll tell my lawyer the truth.

26 DEF: Were you tripping when you woke up[?]

27 J: I wasn't tripping. I remembered what I did.

28 ...

DEF: [T]he paper said that me and you were good friends with the guy  
that got killed. Isn't that bullshit? I didn't even know the mother fucker.

J: I don't know what he looks like or anything.

...

DEF: They put someone in the cell next to me. Some black dude.

J: Yeah he is in for murder, too, but he is gonna die because he is guilty  
(laugh).

DEF: He is probably just as guilty as we are.

...

DEF: Guess what? They just brought someone with a murder case.

They are booking someone for murder and guess who it is. The right  
guy!

...

DEF: ...They brought someone else in last night on our charges. Guess  
who it was? Sanjay.

...

J: Who is that?

DEF: The real guy.

J: When I plead not guilty today, I'm gonna tell my lawyer that I was lying  
on the tape.

...

1 J: I don't even know who this Sanjay is. I never heard of the dude.  
...  
2 J: I think they know they fucked up. Because I made that stupid ass  
3 statement.  
4 DEF: I didn't do nothing.  
5 J: No shit. I didn't do shit.  
6 ...  
7 J: I didn't do shit.  
8 ...  
9 J: ...I really thought I had a black out because they were saying that you  
10 ratted on me. I couldn't remember shit. They said Ricky and Randy  
11 ratted on me. I couldn't believe it man. Finally I started bullshitting.  
12 DEF: Did they ask you what door we went in?  
13 J: Yeah.  
14 DEF: What door did you say?  
15 J: Where the bells at and shit right where the door bell is at. That's what  
16 happened. I don't think my story matches, man. I just bullshitted.  
17 ...  
18 DEF:...I wonder what Sanjay says about it. I wonder what they got on  
19 him.  
20 ...  
21 J: I hope Sanjay doesn't try to put some story on us. We'll have to just  
22 wait until 11:00.  
23 ...  
24 DEF: They are getting ready to file on me. I wonder what they got on  
25 fucking [Sanjay]. I hope they got everything.  
26 J: I definitely fucked up.  
27 DEF: I talked to your dad that you definitely made a false statement under  
28 the influence, and you are gonna change it.  
...  
J: They ain't got shit because my statement ain't legit.  
...  
DEF: When did they arrest you?  
J: About 4:00. I finally said fuck it. I thought I actually did it. They talked  
about fingerprints.  
DEF: That's bullshit.  
J: Now I know it is. They were bullshitting left and right.  
J: I'll definitely testify that I lied and shit. They were bullshitting us, they  
were bullshitting me so, I bullshitted.  
...  
J: I fucked up, I fucked up. It took about 5 hours, but I fucked up.  
...  
J: Sure hope that Sanjay dud comes through.  
...  
[some indiscernible whispering]  
DEF: I get to go up to [a different unit] and talk to Sanjay now.  
J: No shit. Hope he did it. Try to find out what the fuck...  
DEF: I'll try to find out what happened.  
...

1 DEF: I hope I get to talk to Sanjay.

2 J: No shit. I wonder if that mother fucker ratted on both of us.

3 ...

4 DEF: I just found out some valuable info. It's bad.

5 J: What? Have you been thinking?

6 DEF: No, I was just in there on the phone. I was talking to Randy and  
7 Kenny.

8 ...

9 DEF: They fucking know where the gun came from and where it went.

10 ...

11 DEF: They know who gave Sanjay the gun and everything.

12 J: Oh, no. Are they going to go to the detectives and tell them or what?

13 DEF: The detective was just here. I called Kenny and Randy. They said  
14 after the detectives busted me, someone was in the park. This guy in the  
15 park they were telling that Ricky and Joel got busted for that murder. This  
16 guy goes, "That's bullshit, because I gave Sanjay the gun and when  
17 Sanjay did it, he gave the gun back to his girlfriend. His girlfriend stashed  
18 it.

19 ...

20 J: If they find the gun... (something about Kenny)

21 DEF: He is my witness, man.

22 J: Plus my alibi... Well, let's put it this way. Either one of us is innocent or  
23 both of us is guilty.

24 ...

25 DEF: I hope Randy and Kenny don't puss out. Randy might because he  
26 said he might, saying "I'm not gonna get involved."

27 ...

28 J: Fuck, I'm gonna tell you what. I'm gonna cut down on partying and  
stuff. So I can be straight – fucking – minded, so that they can't ever pull  
that stuff on me again.

...

J: They were freaking me out man. I thought I actually did it. I was  
tripping.

(AG's Exhibit 31, 253-254, 256-257, 259-264, 266-268, 272.)

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**BEFORE THE VICTIM COMPENSATION BOARD  
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:  
**Joel Alcox**  
Claim Number: 16-ECO-03

**Notice of Decision**

On August 17, 2017, the California Victim Compensation Board rejected the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

The California Victim Compensation Board instead found that Joel Alcox had proven his innocence pursuant to Penal Code section 4900 and recommended that the Legislature appropriate \$1,330,280.00 to compensate Joel Alcox for the 9,502 days he spent wrongfully incarcerated (arrest date = March 25, 1986, release date = March 29, 2012).

Date: August 23, 2017

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Tisha Heard  
Board Liaison  
California Victim Compensation Board