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

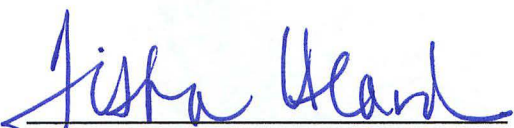
In the Matter of the Claim of:

**Notice of Decision**

**Reggie Cole**

On October 20, 2016, the California Victim Compensation Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: October 21, 2016



Tisha Heard  
Board Liaison  
California Victim Compensation Board

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

In the Matter of the Claim of:  
**Reggie Cole**

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

**Introduction**

This claim for compensation as an erroneously convicted person was decided based on the written record by considering all the evidence submitted to date. Kyle Hedum was assigned to this matter by the Executive Officer of the California Victim Compensation Board (CalVCB). Reggie Cole (Cole) was represented by Justin Brooks, Jan Stiglitz, Alexander Simpson, and Raquel Cohen of the California Innocence Project and Brett Schreiber and Alanna Rutan of the firm Thorsnes Bartolotta McGuire. The California Department of Justice, Office of the Attorney General (AG), was represented by deputy attorney general Craig Meyers.

After Cole was released from prison on May 15, 2010, the Los Angeles Superior Court determined on September 21, 2015, that Cole had proven by a preponderance of the evidence that he was factually innocent of the crime of murder. Therefore, the CalVCB must recommend to the Legislature payment of the claim. The only issue before the CalVCB is the determination of the appropriate amount of compensation.

**Procedural Background**

On March 27, 1994, three men drove to a house of prostitution. One of the men (Gonzalez) left the car to enter the building but was turned away. As he was walking back to the car, three or four men

1 attempted to rob Gonzalez and his friends. Shots were fired and Gonzalez was killed and his friends  
2 were injured.

3 Cole was arrested, and on August 1, 1995, he was convicted of one count of murder and two  
4 counts of attempted murder.<sup>1</sup> Cole was sentenced to life in prison without parole on November 2,  
5 1995.

6 On February 24, 1997, the California Court of Appeal affirmed Cole's judgment and sentence.  
7 On May 8, 1997, the California Supreme Court denied Cole's Petition for Review.

8 On November 28, 2000, Cole stabbed and killed his cellmate (Clark) while incarcerated at  
9 Calipatria State Prison in Imperial County. On March 2, 2001, the Imperial County District Attorney  
10 charged Cole with first degree murder of Clark, assault by a life prisoner, and custodial possession of a  
11 weapon. The charges included the special circumstances<sup>2</sup> of previous murder and lying in wait.<sup>3</sup>

12 On June 22, 2007, Cole filed a motion to strike the prior murder special circumstance allegation.  
13 This motion was filed primarily to remove the death penalty as a possible sentence for the Clark  
14 murder. An extensive evidentiary hearing on that motion took place between October 12, 2007, and  
15 January 29, 2008. On January 29, 2008, Imperial County Judge Donnelly held that, on a variety of  
16 grounds, Cole was denied his constitutional right to effective assistance of counsel in the 1995  
17 Gonzalez murder trial and granted his motion to strike the prior murder special circumstance allegation.  
18 The underlying murder conviction remained undisturbed.

19 On February 8, 2008, Cole pled no contest to voluntary manslaughter as a lesser included  
20 offense to the Clark murder. The court dismissed the remaining charges and special allegations and  
21 the parties agreed to the upper-term of 11 years in state prison. Cole also agreed to waive his right to

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22 <sup>1</sup> Co-defendant Obie Anthony was also convicted on August 1, 1995, of one count of murder and two  
23 counts of attempted murder.

24 <sup>2</sup> The filing of charges with special circumstances allows for a penalty of death or life in prison without  
25 the possibility of parole.

26 <sup>3</sup> Per Black's Law Dictionary (8<sup>th</sup> ed. 2004, p. 968), lying in wait is the series of acts involved in  
27 watching, waiting for, and hiding from someone, with the intent of killing or inflicting serious bodily injury  
28 on that person.

1 appeal this conviction. On March 13, 2008, the Imperial County Superior Court sentenced Cole to 11  
2 years in state prison for the Clark killing, consecutive to the time he was serving in prison for the  
3 Gonzalez murder.

4 On December 31, 2008, Cole filed a Petition for Writ of Habeas Corpus in the Los Angeles  
5 County Superior Court requesting reversal of the Gonzalez murder conviction. On April 8, 2009, the  
6 District Attorney for Los Angeles County conceded Cole's habeas petition on the grounds of ineffective  
7 assistance of counsel, based on the Imperial County Superior Court's findings. On April 15, 2009, the  
8 Los Angeles County Superior Court ordered the Gonzalez murder conviction reversed on the grounds  
9 of ineffective assistance of counsel.<sup>4</sup> Cole was not retried on the Gonzalez murder.

10 On August 13, 2009, Cole returned to the Imperial County Superior Court for resentencing on  
11 the Clark murder based on the reversal of the Gonzalez murder conviction. Judge Donnelly  
12 resentenced Cole and credited him 3,656 days of custody and conduct credits. On May 15, 2010, Cole  
13 was released from prison. On or about April 11, 2012, Cole filed a timely request for compensation due  
14 to being erroneously convicted and imprisoned. Cole then obtained a finding of factual innocence from  
15 the Los Angeles County Superior Court on September 21, 2015.

#### 16 **Claimant's Position**

17 While erroneously incarcerated on the Gonzalez murder, Cole learned that his cellmate Clark, a  
18 prison "shot caller," was planning to kill him because Cole refused to accept responsibility for an  
19 offense committed by another inmate. Since Cole was serving a sentence of life without the possibility  
20 of parole, the "code" required that he accept responsibility--and additional incarceration--for an offense  
21 committed by another inmate. Cole refused and, as a consequence, he was forced to defend his own  
22 life during a prison fight.<sup>5</sup>

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25 <sup>4</sup> The Los Angeles County Superior Court held that the finding of ineffective assistance of counsel by  
26 the Imperial County Superior Court was binding based on the doctrine of collateral estoppel.

27 <sup>5</sup> No evidence was submitted that supports Cole's claim that he killed Clark in self-defense.

1 Cole argues that his claim for compensation is essentially a civil remedy. Accordingly, to  
2 properly analyze "causation" in this instance, one must look to long-established principles of civil tort  
3 law. Preliminarily, there can be no dispute that "but for" Cole's wrongful arrest and conviction for the  
4 Gonzalez murder, he would have never been in Calipatria State Prison. His cellmate would have never  
5 planned to kill him and Cole would not have had to defend himself by killing his cellmate. Cole also  
6 asserts that his erroneous conviction and incarceration for the Gonzalez murder created a foreseeable  
7 risk that he would be attacked and would be forced to defend himself. In other words, it was  
8 foreseeable that he might be forced to kill someone in prison.

9 The next step in the causation analysis looks to "legal" or "proximate" cause and is ultimately a  
10 question of foreseeability. Notably, in conducting the foreseeability analysis, this Board's task is not to  
11 decide whether the claimant's injury was reasonably foreseeable in light of the government's conduct,  
12 but rather to evaluate more generally whether the category of wrongful conduct at issue is sufficiently  
13 likely to result in the kind of harm experienced that liability may appropriately be imposed. The  
14 question, in the context of Cole's claim, is whether providing ineffective assistance of counsel, resulting  
15 in wrongful conviction and incarceration, creates a foreseeable risk to a foreseeable claimant in the  
16 future.

17 When viewed through this lens, and looking to right this wrong, it becomes abundantly clear that  
18 the Clark killing arose directly from and through Cole's wrongful conviction and incarceration for the  
19 Gonzalez murder. There is no case law or statutory support for the proposition that Cole's  
20 compensation claim should arbitrarily end on November 28, 2000, the day Clark was killed, as the AG  
21 suggests.

22 Contrary to *People v. Bruner* (1995) 9 Cal.4<sup>th</sup> 1178, a case cited by the AG, a far more  
23 appropriate analysis for the issues presented here can be found within *In re Marquez* (2003) 30 Cal. 4<sup>th</sup>  
24 14. Marquez was first arrested, charged, and convicted in Santa Cruz County. A hold was placed on  
25 him by Monterey County where he was subsequently charged and convicted as well. The Santa Cruz  
26 conviction was later appealed, overturned, and the charges dismissed. The court determined that  
27 because the Santa Cruz County charges were dismissed, no possibility of a windfall (in the form of  
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1 double credit) to petitioner existed. The court noted that Marquez sought credit only for the time he  
2 spent in custody from the day he was sentenced in Santa Cruz County until the day he was sentenced  
3 in Monterey County. The court explained that once the Santa Cruz County conviction was reversed on  
4 appeal and the charges dismissed, the time in question became attributable to petitioner's Monterey  
5 County conviction. Thus, Marquez was entitled to additional credit. The Court then calculated credit  
6 from date of sentencing in the first Santa Cruz case (that was earlier overturned and dismissed) to the  
7 date of sentencing in the second Monterey County case (which was a legitimate conviction).

8 Penal Code<sup>6</sup> section 2900.5, also cited by the AG, simply does not apply to the analysis in  
9 Cole's case. This section provides that credit shall be given only once for a single period of custody  
10 attributable to multiple offenses for which a consecutive sentence is imposed. Here, Cole only had one  
11 offense and one valid sentence. There were not multiple offenses with multiple valid sentences; thus  
12 the limitation that credit only be given once is inconsequential.

13 Due to his erroneous conviction and subsequent incarceration, Cole asks that the CalVCB grant  
14 his claim in the amount of \$824,320 for his imprisonment of 5,888 days at the rate of \$140 per day,  
15 from his date of arrest on the Gonzalez murder on April 1, 1994, until he was released from prison after  
16 serving his sentence on the Clark killing, on May 15, 2010.

17 In the alternative, if the CalVCB determines that Cole is not entitled to compensation for the  
18 entirety of the time he served in prison, Cole requests that the CalVCB grant his claim in the amount of  
19 \$713,300 for his imprisonment of 5,095 days at the rate of \$140 per day, from his date of arrest on the  
20 Gonzalez murder on April 1, 1994, to the date of sentencing in the Clark killing on March 13, 2008.

21 Finally, Cole argues he is owed, at a minimum, \$340,620 for his wrongful incarceration of 2,433  
22 days at the rate of \$140 per day, from his date of arrest on the Gonzalez murder on April 1, 1994, until  
23 the commission of the Clark murder on November 28, 2000.

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27 <sup>6</sup> All further statutory references are to the Penal Code unless otherwise indicated.

1 **AG's Position**

2 The AG's position is that the Legislature did not intend to provide compensation under section  
3 4900 to an inmate for time he is serving under a lawful conviction where that term is served concurrent  
4 to another term that is later reversed. Section 2900.5, subdivision (b), an analogous section on pre-  
5 sentence custody credits, reads:

6 For the purposes of this section, credit shall be given only where the custody to be credited is  
7 attributable to proceedings related to the same conduct for which the defendant has been  
8 convicted. Credit shall be given only once for a single period of custody attributable to multiple  
9 offenses for which a consecutive sentence is imposed.

10 The California Supreme Court interpreted section 2900.5, subdivision (b), in *People v. Bruner*  
11 (supra) 9 Cal.4th 1178. The court held that where an adult offender's period of presentence custody  
12 stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a  
13 subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies  
14 the term to be credited was also a "but for" cause of the earlier restraint. The court held that this statute  
15 did not intend to allow credit for a period of presentence restraint unless the conduct leading to the  
16 sentence was the true and only unavoidable basis for the earlier custody. The court determined that  
17 the defendant was not entitled to presentence credits because defendant had not shown that he could  
18 have been free during any period of his presentence custody but for the same conduct that led to the  
19 instant conviction and sentence.

20 Likewise here, Cole cannot pass the "but for" test. The AG submits that Cole would have been  
21 in prison on the Clark killing from November 28, 2000, until his release from prison on May 15, 2010,  
22 because his sentence was ultimately ordered to run concurrent to the Gonzalez murder. Accordingly,  
23 he is not entitled to receive any compensation for this separate, unrelated, non-erroneous prison  
24 sentence. Cole was incarcerated solely on the Gonzalez murder from April 1, 1994 until November 28,  
25 2000, for a total of 2,433 days. At \$140 per day, Cole is entitled to \$340,620.

1 **Determination of Issues**

2 The Los Angeles County Superior Court granted Cole's petition for writ of habeas corpus on  
3 April 15, 2009, overturning the 1995 Gonzalez murder conviction. On September 21, 2015, the court  
4 found Cole factually innocent of the Gonzalez murder pursuant to section 1485.55. A finding of  
5 factual innocence under section 1485.55 requires the CalVCB to recommend to the Legislature that it  
6 appropriate funds for payment of compensation of a section 4900 claim.<sup>7</sup> The claimant need show no  
7 more than the court's declaration of his factual innocence for the CalVCB to recommend to the  
8 Legislature that compensation be paid under section 4900 et. seq.

9 The cases cited by Cole and the AG, while informative, are not directly on point. In *Marquez*,  
10 *supra*, 30 Cal. 4<sup>th</sup> 14, cited by Cole, the petitioner sought credit only for the time he spent in custody  
11 from the day he was sentenced in Santa Cruz County (which was reversed on appeal and the  
12 charges dismissed) until the day he was sentenced in Monterey County. The Court held that once  
13 the Santa Cruz conviction was overturned, the time in question became attributable to petitioner's  
14 Monterey County conviction.

15 This case is distinguished from Cole's fact pattern because Marquez had already committed  
16 multiple crimes in multiple jurisdictions at the time he was originally sentenced in Santa Cruz County.  
17 Marquez was not erroneously convicted, imprisoned, and then charged with a crime that occurred  
18 after his incarceration. Had Cole not killed Clark in prison, he would have been entitled to claim  
19 compensation for the entire period of incarceration. However, Cole did kill Clark. Cole admitted his  
20 responsibility in killing Clark by pleading no contest to manslaughter. Cole ultimately received full  
21 credit for the 11 years he served on the Clark conviction.

22 In *Bruner*, *supra*, 9 Cal.4th 1178, cited by the AG, the Court held that where an adult  
23 offender's period of presentence custody stems from multiple, unrelated incidents of misconduct,  
24 such custody may not be credited against a subsequent formal term of incarceration if the prisoner  
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27 <sup>7</sup> Pen. Code, § 4902, subd. (a).  
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1 has not shown that the conduct which underlies the term to be credited was also a "but for" cause of  
2 the earlier restraint.

3 Cole's theory that Clark's murder would not have occurred "but for" his erroneous conviction in  
4 the Gonzalez case is unconvincing. As will be explained below, Cole cannot avoid responsibility for  
5 killing Clark. Because he was properly convicted and imprisoned on the separate, unrelated Clark  
6 killing, that period of incarceration cannot be used as credit for terms of compensation.

7 Cole was arrested for the Gonzalez murder on April 1, 1994. On November 28, 2000, while  
8 incarcerated in prison, Cole killed Clark. Cole's argument that he is entitled to be compensated for  
9 the entirety of the time he spent in prison because, "but for" the erroneous 1994 conviction, he would  
10 not have been in prison and he would not have killed his cellmate, is unconvincing. It is true that "but  
11 for" Cole's erroneous conviction, he would not have been incarcerated and thus Clark would not be  
12 dead. But, Cole's claim that the Clark killing arose directly from and through his wrongful conviction  
13 and incarceration is not persuasive. Cole attempts to skirt responsibility for Clark's death, an act  
14 committed of his own volition and under alleged lying in wait circumstances.

15 If Cole was defending himself at the time he killed Clark, he should have opposed the murder  
16 charge and gone to trial. He then could have presented evidence to a judge or jury that he killed  
17 Clark in self-defense and thus was not guilty of any crime. Instead, Cole chose to plead no contest to  
18 manslaughter. This plea was voluntary and accepted after the prosecutor withdrew the murder  
19 special circumstance allegation. Cole received an 11-year sentence and he also agreed that he  
20 would not appeal this conviction and sentence. Cole's 11-year sentence was originally to run  
21 consecutive to the Gonzalez murder sentence. After the Gonzalez murder conviction was reversed,  
22 Cole was resentenced on the Clark conviction. The original 11-year sentence for Clark's killing was  
23 modified to run concurrently with the now-vacated Gonzalez conviction and Cole received 3,656 days  
24 of custody and conduct credits.

25 An inmate in a California state prison cannot and does not get a "free pass" for committing  
26 crimes while in prison. If so, no prison crimes would ever be prosecuted. That is clearly not the case.  
27 The fact that Cole's original prison sentence was determined to be erroneous does not make Clark's

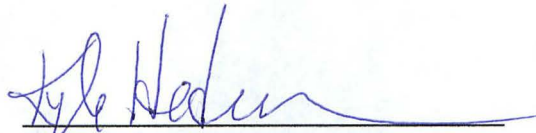
1 death any less criminal. Cole stabbed his cellmate Clark to death and Cole was properly charged  
2 and convicted of Clark's death.

3 Because Cole's conviction and imprisonment on the Clark killing was not erroneous he did not  
4 suffer injury as required by Penal Code section 4904. Cole is thus not entitled to compensation for  
5 the 11 years he served on the Clark conviction.

6 **Calculation of Amount of Compensation**

7 Cole spent 2,433 days in jail and in prison. This period of time is calculated from the date of  
8 Cole's arrest on the Gonzalez murder until the date he killed his cellmate Clark. At \$140 per day, the  
9 CalVCB must recommend to the Legislature that it appropriate \$340,620.

10  
11 Date: September 28, 2016

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13 Kyle Hedum  
14 Hearing Officer  
15 California Victim Compensation Board