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

9 In the Matter of the Claim of:

10 **Leonard McSherry**

11 Claim No. G523223

Proposed Decision
(Penal Code § 4900 et seq.)

12 A hearing on this claim was held on August 2, 2002, in Sacramento, California, by
13 Judith A. Kopec, Chief Hearing Officer, who was assigned to hear this matter by the Executive Officer
14 of the State Board of Control (Board).¹

15 The claimant, Leonard McSherry, was represented by Mark E. Overland and
16 Julie M. Ruhlin, Attorneys, Overland & Borenstein LLP. Mr. McSherry did not attend the hearing.

17 The Attorney General was represented by Deputy Attorney General Michael Farrell.

18 **Findings of Fact**

19 1. On March 11, 1988, a six-year-old girl was kidnapped, raped and sexually molested in
20 Long Beach, California. Mr. McSherry was arrested for these crimes on May 17, 1988.

21 2. A jury convicted Mr. McSherry on October 25, 1988, of forcible rape (Pen. Code,
22 § 261(2)), a felony, with infliction of great bodily injury (Pen. Code, § 12022.8); oral copulation of a
23 person under 14 years of age and 10 years younger (Pen. Code, § 288a (c)), a felony; rape by foreign
24 object (Pen. Code, § 289(a)), a felony; and kidnapping to commit a violation of Penal Code section
25 288 on a victim under 14 years of age (Pen. Code, §§ 207(b), 667.8(b)). Mr. McSherry was sentenced
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29 ¹ The parties waived the requirement of Penal Code section 4902 that the Board provide at least 15 days' notice of a hearing on a claim.

1 to a term of imprisonment of 48 years to life and remanded to the custody of the California Department
2 of Corrections.

3 3. Mr. McSherry provided blood samples prior to his trial which underwent DNA testing.
4 However, there was an insufficient amount of DNA from the victim's clothing to compare with
5 Mr. McSherry's sample, given the technology available at the time.

6 4. After the conclusion of Mr. McSherry's trial in October 1988 and before he was
7 sentenced, Mr. McSherry obtained a DNA analysis that excluded him as the donor of semen found on
8 the victim's clothing.

9 5. Mr. McSherry filed a motion for a new trial based on the newly-available DNA
10 evidence. The trial court denied the motion, which was upheld by the Second District Court of
11 Appeal. (*People v. McSherry* (1992) 11 Cal.App.4th 1157, 14 Cal.Rptr.2d 630, 1992 Cal.App. LEXIS
12 1460; ordered not published.) The Court of Appeal determined that the evidence of Mr. McSherry's
13 guilt was very strong and the newly discovered evidence inconclusive. (*Ibid.*)

14 6. Mr. McSherry obtained additional DNA test results after the 1992 Court of Appeal
15 decision and twice filed petitions for writs of habeas corpus, both in the Court of Appeal and in the
16 California Supreme Court. The petitions were contested by the state and rejected by the courts.

17 7. On July 12, 2001, Mr. McSherry filed a motion for post-conviction DNA testing under
18 Penal Code section 1405.

19 8. Cellmark Diagnostics performed a comparative DNA analysis of sperm samples
20 collected from the victim and Mr. McSherry's blood. On December 13, 2001, Cellmark Diagnostics
21 reported that Mr. McSherry was excluded as the source of sperm found on the victim.

22 9. Mr. McSherry filed a petition for writ of habeas corpus on December 14, 2001.

23 10. On December 21, 2001, the California Department of Justice, Bureau of Forensic
24 Services, DNA Laboratory reported that sperm samples found on the victim matched
25 George Valdespino, an inmate serving 45 years to life in prison for the 1997 kidnapping and
26 molestation of a girl in Torrance, California. On December 27, 2001, Mr. Valdespino admitted
27 kidnapping and sexually molesting the victim in 1988 in Long Beach, California.

28 11. On December 28, 2001, the Superior Court of Los Angeles County granted
29 Mr. McSherry's petition for writ of habeas corpus, vacated the judgment and set aside the conviction,

1 entered a plea of not guilty on all counts, granted the People's motion to dismiss in the furtherance of
2 justice under Penal Code section 1385, ordered Mr. McSherry's release, and ordered that
3 Mr. McSherry register with the local police agency as a sex offender as prescribed by law.

4 12. Mr. McSherry was released from custody on December 28, 2001.

5 13. Mr. McSherry filed a claim under Penal Code section 4900 et seq. with the Victim
6 Compensation and Government Claims Board (Board) on February 11, 2002, within six months of his
7 release from imprisonment.

8 14. On May 24, 2002, Deputy Attorney General Farrell informed the Board that the
9 Attorney General did not oppose the merits of Mr. McSherry's claim.

10 15. On July 25, 2002, the Superior Court of Los Angeles County granted Mr. McSherry's
11 motion for a finding of factual innocence under Penal Code section 851.8(d). The People did not
12 object to the motion.

13 16. As a member of the Paper Mill Workers Union, Mr. McSherry worked at various paper
14 box factories in southern California. In 1985 through part of 1986, Mr. McSherry worked at Southern
15 California Carton Co. and Gleason Industries.

16 17. Mr. McSherry was incarcerated on misdemeanor charges in parts of 1986 and 1987.
17 Upon his release, when he learned that paper factories were not hiring, he worked painting houses and
18 planned to work as a mover for a furniture company. Mr. McSherry was painting his grandparents'
19 home when he was arrested in 1988.

20 18. The Attorney General offered no evidence or testimony at the hearing on this claim.

21 **Determination of Issues**

22 1. A person convicted and imprisoned for a felony may submit a claim to the Board for
23 pecuniary injury sustained through his erroneous conviction and imprisonment. (Pen. Code, § 4900.)
24 The claim must be filed within six months after release from imprisonment. (Pen. Code, § 4901.)
25 Mr. McSherry's claim is timely.

26 2. The claimant must prove the following: (1) that the crime with which he was charged
27 was either not committed at all, or, if committed, was not committed by him; (2) that he did not by any
28 act or omission on his part, either intentionally or negligently, contribute to the bringing about of the
29 arrest or conviction for the crime; and (3) he sustained pecuniary injury through the erroneous

1 conviction and imprisonment. (Pen. Code, § 4903.) The Board may consider any information that it
2 deems relevant to the issues. (Cal. Code Regs., tit. 2, § 641.) The claimant has the burden of proving
3 his innocence by a preponderance of the evidence. (*Diola v. Board of Control* (1982) 135 Cal.App.3d
4 580, 588 fn 7, 185 Cal.Rptr.2d 511, 516 fn 7.)

5 3. A finding of factual innocence shall not be made unless the court finds that no
6 reasonable cause exists to believe that the person committed the offense. (Pen. Code, § 851.8(b).) To
7 obtain a finding of factual innocence, the person must establish that facts exist that “. . . would lead no
8 person of ordinary care and prudence to believe or conscientiously entertain any honest and strong
9 suspicion . . .” that the person is guilty of the charged crimes. (*People v. Mathews* (1992) 7
10 Cal.App.4th 1052, 1056, 9 Cal.Rptr.2d 348, 350, citing *People v. Scott M.* (1985) 167 Cal.App.3d 688,
11 699, 213 Cal.Rptr. 456.)

12 4. Paragraph 8, 10 and 11 of the Findings of Fact provide sufficient evidence that
13 Mr. McSherry did not commit the crimes for which he was convicted.

14 5. Paragraphs 3 and 4 of the Findings of Fact provide sufficient evidence that
15 Mr. McSherry did not by any act or omission on his part contribute to the bringing about of his arrest
16 or conviction for the crimes at issue.

17 6. Paragraphs 16 and 17 of the Findings of Fact provide sufficient evidence that
18 Mr. McSherry sustained pecuniary injury through his erroneous conviction and imprisonment.

19 7. If a claimant meets the requirement of Penal Code section 4903, the Board shall report
20 the facts of the case and its conclusion to the Legislature with a recommendation that the Legislature
21 make an appropriation to indemnify the claimant for his pecuniary injury. (Pen. Code, § 4904.) The
22 appropriation recommended shall be a sum equal to \$100 per day of incarceration served after the
23 claimant's conviction. (*Ibid.*)

24 8. Mr. McSherry was incarcerated a total of 4,812 days after his conviction. At \$100 per
25 day, this amounts to \$481,200.

Order

The Board shall recommend that the Legislature make an appropriation in the amount of \$481,200 to indemnify Mr. McSherry for pecuniary injury sustained through his erroneous conviction and imprisonment.

Date: August 7, 2002

JUDITH A. KOPEC
Chief Hearing Officer

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Notice of Decision

14 On August 23, 2002, the California Victim Compensation and Government Claims Board
15 adopted the attached Proposed Decision of the Chief Hearing Officer as its Decision in the above-
16 referenced matter. The Decision became effective on August 23, 2001.
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19 Date: September _____, 2002

20 _____
21 CATHERINE CLOSE
22 Chief Counsel
23 California Victim Compensation
24 and Government Claims Board
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