

1
2
3
4
5
6
7
8 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
9 **OF THE STATE OF CALIFORNIA**
10

11 In the Matter of the Claim of:

12 **Longino Acero**

13 Claim No. G561657

Proposed Decision

(Penal Code § 4900 et seq.)

14
15 **Introduction**

16 A hearing on this claim was held on June 6, 2007, in Sacramento, California, by Roslyn Mack,
17 the Hearing Officer assigned to hear this matter by the Executive Officer of the Victim Compensation
18 and Government Claims Board (Board).

19 Attorney Anthony Boskovich represented the claimant, Longino Acero (Acero). Acero
20 appeared at the hearing and testified under oath. A legal expert, Allen Schwartz, also appeared and
21 testified under oath.

22 The California Department of Justice, Office of the Attorney General (Attorney General) stated
23 that it would not present any evidence in opposition to the claim and did not appear at the hearing.

24 After consideration of all the evidence before the Hearing Officer, it is determined that Acero
25 failed to prove by a preponderance of the evidence that he did not, either intentionally or negligently,
26 contribute to his arrest or erroneous conviction for failure to register as a sex offender under Penal
27 Code section 290. The Hearing Officer recommends that Acero's claim for compensation under Penal
28 Code section 4900 be denied.

29 *///*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

Procedural History

This claim for compensation arises out of the Acero's 2001 felony conviction and 2002 imprisonment for failure to register as a sex offender pursuant to Penal Code section 290, relating to his 1978 conviction for a lewd and lascivious act in public. The hearing transcript of the 1978 conviction reflects that the prosecutor was careful to point out that Acero was not being charged under former Penal Code section 647a, child molestation, but rather with 647(a) lewd and lascivious act in public.¹ However, due to a clerical error, the abstract of judgment incorrectly listed "Penal Code section 647a," child molestation, as the convicted crime. Later computer records mistakenly showed that Acero was required to register as a sex offender. Numerous government officials erroneously told Acero that he was required to register as a sex offender.

Acero was charged with failure to register as a sex offender for his 1978 conviction in violation of Penal Code section 290 and plead no contest or admitted probation violations on four occasions:

- 1) In 1994, Acero was charged with a misdemeanor failure to register as a sex offender, plead no contest, and served time in jail.
- 2) In 2001, Acero was charged with a felony failure to register as a sex offender, plead no contest, and was sentenced to time served in jail and probation.
- 3) In 2002, Acero appeared before the Court on a probation violation for failure to register. Acero admitted a probation violation and was sentenced to two years and four months in state prison.
- 4) In 2003, Acero was charged with a violation of Penal Code section 290, plead no contest, and was sentenced to time in jail and probation.

On March 28, 2006, the Santa Clara Superior Court found that Acero was not required to register as a sex offender and was factually innocent of the charges of violating Penal Code section 290. Acero's pleas were ordered withdrawn and the charges were dismissed.

///

///

¹ Penal Code section 647a was later renumbered to Penal Code section 647.6 in 1987. (Stats. 1987, c. 1418, § 4. 3).

1 Acero subsequently filed this claim with the Board pursuant to Penal Code section 4900,
2 asserting that he had been erroneously convicted of violating Penal Code section 290.² Acero
3 requests compensation for 465 days for the 2001 conviction and 2002 imprisonment.³ Acero argues
4 that he did not contribute to his arrest and conviction because his pleas were not voluntary and
5 intelligent. In its written recommendation to the Board, the Attorney General maintains that Acero
6 contributed to his arrest and felony conviction by pleading no contest, but does not object to the Board
7 making an award to Acero on equitable grounds.

8 Summary of Evidence

9 I. Testimony by Acero.

10 At the hearing, Acero provided the following testimony, relevant to this decision, in summary.

11 The highest level of education that Acero completed was the eleventh grade, and he could not
12 read and write very well. Acero was arrested in 1978, at age nineteen for attempted rape. On July 26,
13 1978, Acero plead guilty to a misdemeanor violation of Penal Code section 647(a), a lewd and
14 lascivious act towards an adult woman in a public place and was sentenced to 60 days in jail. Although
15 the Court advised Acero that he may be required to register as a sex offender, he was not ordered to
16 register as a sex offender.

17 Acero was not required to register as a sex offender between 1978 and 1987, and he was never
18 charged with failure to register as a sex offender. However, during this time period, he was arrested
19 and incarcerated on other charges.⁴ In 1987, when Acero was paroled from prison on other charges,
20 his counselor told Acero that he was required to register as a sex offender. Acero refused to sign
21 papers stating that he was a sex offender. After being told that he would not be released unless he
22 registered and that he could discuss the issue later with his parole officer, Acero signed the paperwork.

23
24 ² In addition to this claim under Penal Code section 4900, Acero is currently pursuing two other
25 separate causes of action regarding this matter. First, he has filed a malpractice lawsuit against his
26 criminal defense attorneys. Second, Acero is pursuing a 1983 federal civil rights claim against the
Public Defenders Office for deliberate under-funding, failure to train, and allowing ineffective assistance
of counsel. His attorney states that there are statute of limitations problems with each of the cases.

27 ³ In the original claim, Acero claimed that he was erroneously incarcerated for 465 days. His testimony
28 conflicts with documentation that he later provided regarding the number of days of incarceration.

29 ⁴ Acero testified that he was arrested primarily for drug-related crimes, but his evidence of his criminal
record not related to the request for compensation was not discussed at the hearing.

1 He talked to his parole officer, who again asked him to sign another paper as a sex offender. When he
2 refused, he was taken into custody for 45 days in order to appear before the Parole Board, which told
3 him to sign the paper or he would be sent back for another 45 days. Acero was not represented by an
4 attorney before the Parole Board, and he signed a paper admitting that he was a sex offender.

5 In 1994, Acero was charged with misdemeanor failure to register as a sex offender pursuant to
6 Penal Code section 290.⁵ Acero told the public defender that he was not required to register as a sex
7 offender, and the public defender told Acero that he had to register. Acero believed that the public
8 defender had investigated the charges and relied on the public defender's advice. Acero plead no
9 contest because he was already going to prison on other charges and the sentences would be
10 concurrent.

11 In 2001, Acero was charged with felony failure to register as a sex offender under Penal Code
12 section 290, subdivision (g)(2), for his 1978 conviction. Acero told a different public defender that he
13 did not have to register, and he believed that the public defender would investigate the charge.
14 According to Acero, the public defender told Acero that the law had changed and he was required to
15 register. The public defender further advised Acero that he faced 18 years in prison if he did not accept
16 the plea deal. Acero believed the public defender and plead no contest. He was sentenced to 120
17 days in jail (time served) and three years probation. He went home later that day.

18 In December 2002, Acero appeared in court for a probation revocation hearing for failure to
19 register under Penal Code section 290. Acero told another public defender that he did not have to
20 register and wanted to fight the charges. He then demanded to talk to the judge. The parties
21 discussed the case off record. The district attorney refused to work with him and the judge said
22 nothing. The district attorney and public defender said that Acero had to register. Acero faced four
23 years and eight months in prison if he did not accept the plea deal of two years and four months. The
24 public defender advised Acero to plead. When Acero did not want to accept the plea, the public
25 defender "threw up his hands," and told Acero to do whatever he wanted. From that point on, the public
26 defender did not say anything else during the hearing. Acero admitted a violation of probation for
27

28 ⁵ Penal Code section 290 requires individuals convicted of certain crimes or otherwise required by a
29 court to register with local law enforcement as sex offenders and describes the procedure and timelines
for registering.

1 failure to register and was sentenced to two years and four months in state prison.⁶ He was sent to
2 prison and was paroled on October 1, 2003. He was later arrested again on a probation violation in
3 2003 and served time in prison in 2004.⁷

4 In December 2003, Acero was again charged with a violation of Penal Code section 290 and
5 had a hearing in February 2004, where he was again represented by a public defender. He had been
6 identified in the newspaper as a sex offender. Acero testified that he told the public defender that he
7 did not have to register and expected the public defender to investigate the charges. Based on advice
8 from the public defender, he again pled no contest and was sentenced to time in jail and probation. He
9 received credit for time served.

10 In 2005, the San Jose Police Department sent Acero a letter informing him that there had been
11 an error and he was no longer required to register. Acero's probation officer insisted that he still must
12 register and threatened to violate his probation. Acero hired an new attorney after he attempted to
13 register and could not. After inquiry by Acero's privately retained attorney, the district attorney
14 acknowledged the error.

15 On March 16, 2006, Acero filed a writ of *coram nobis* (writ to correct factual errors) requesting
16 that his convictions under Penal Code section 290 be overturned on the grounds that he was never
17 required to register as a sex offender. On March 28, 2006, the Court found that the Acero was factually
18 innocent of the charges under Penal Code section 290. Acero's pleas were ordered withdrawn and the
19 charges were dismissed. Acero subsequently filed this claim pursuant to Penal Code section 4900,
20 asserting that he was erroneously convicted.

21 Acero testified that he suffered the following pecuniary loss. He paid monetary fines as a result
22 of his convictions. Further, he was employed in the moving business in 2001 and 2002 earning \$13.00

23
24
25 ⁶ Acero testified that he served post-conviction 120 days in county jail prior to being sent to state prison.
26 The record shows that he admitted the probation violation on December 9, 2002, and was held in jail for
27 seven days prior to being sent to prison. He was incarcerated from December 9, 2002 through October
28 1, 2003.

29 ⁷ Acero testified that he was sent to state prison from March 19, 2004 through March 28, 2004 on a
probation violation. He was then sent to Santa Rita on September 8, 2004 through December 31,
2004. This time appears could relate to the December 2003 arrest, but Acero's testimony is unclear at
this point.

1 per hour and could not work while he was in prison. When he was released from prison, it was more
2 difficult to obtain a job since he was labeled a high risk sex offender. Acero's marriage ended.

3 Acero learned from his daughter that flyers were posted in his daughter's school identifying him
4 as a high risk sex offender who had molested a twelve year old girl. Acero denied the allegations.
5 After his release for the 2003 conviction, the local newspaper ran a front page story identifying Acero as
6 a high risk sex offender. Acero incurred attorney fees to clear his name.

7 Since 1987, every attorney and public defender told Acero that he was required to register as a
8 sex offender. Acero relied on his defense attorneys because he did not know the law and thought that
9 they were fighting for him. Acero would have never pleaded no contest to failure to register as a sex
10 offender if he had been told that he did not commit the crime.

11 **II. Testimony of Legal Expert.**

12 A legal expert, Allen Schwartz, Esq., provided the following testimony on Acero's behalf. Mr.
13 Schwartz has practiced criminal law for more than fifteen years and was found to be a qualified expert
14 regarding *habeas* proceedings and ineffective assistance of counsel. A duty to register under Penal
15 Code section 290 arises from a court order requiring the offender to register, and here there was no
16 court order compelling Acero to register. When Acero told his attorney that he did not have to register,
17 his attorney should have investigated the facts because a defense attorney has an obligation to
18 investigate all the facts regardless of the criminal background of the defendant. The 2001 felony
19 complaint noted the incorrect underlying crime as the basis for the failure to register. Penal Code
20 section 290 is complicated and a lay person cannot understand it without the assistance of an attorney.
21 In his opinion, Acero did not have the ability or the education to understand the legal requirements and
22 had to rely on his attorney. He believed that Acero also did not have access to his court file, and that
23 Acero's defense attorney abandoned him in court in 2002.

24 **Findings**

25 A preponderance of the evidence supports the following findings:

- 26 1. In 1978, Acero pled guilty to a misdemeanor violation of Penal Code section 647(a), a
27 lewd and lascivious act in public.

28 ///
29 ///

- 1
 - 2
 - 3
 - 4
 - 5
 - 6
 - 7
 - 8
 - 9
 - 10
 - 11
 - 12
 - 13
 - 14
 - 15
 - 16
 - 17
 - 18
 - 19
 - 20
 - 21
 - 22
 - 23
 - 24
 - 25
 - 26
 - 27
 - 28
 - 29
2. The abstract of judgment and computer records regarding the 1978 charges incorrectly identified the crime as Penal Code section 647a child molestation and mistakenly showed that Acero was required to register as a sex offender.
 3. Acero did not register as a sex offender between 1978 and 1987, and he was not arrested for failure to register during that time period.
 4. Prison officials first told Acero to register as a sex offender in 1987, when he was in prison on other charges, and Acero signed papers stating that he was required to register.
 5. Numerous attorneys and government officials incorrectly told Acero that he had to register as a sex offender.
 6. Acero registered as a sex offender at different times, but did not register on at least four occasions.
 7. In 1994, Acero plead no contest to a misdemeanor for failure to register as a sex offender.
 8. In 2001, Acero plead no contest to a felony for failure to register as a sex offender under Penal Code section 290(g)(2) for his 1978 conviction and was sentenced to time served and probation.
 9. In December 2002, Acero admitted a probation violation for failure to register as a sex offender and was sentenced to time in state prison and paroled on October 1, 2003.
 10. In 2003, Acero was again charged with a violation under Penal Code section 290(g)(2) for failure to register as a sex offender based upon his 1978 conviction and was sentenced to time served in jail and probation.
 11. Acero did not actually commit the crime of failure to register as a sex offender pursuant to Penal Code section 290 because he was never required to register as a sex offender under Penal Code section 290(g)(2) for his 1978 conviction.
 12. On March 28, 2006, the Santa Clara Superior Court found that Acero was factually innocent of the charges of Penal Code section 290.

1 **Determination of Issues**

2 Penal Code section 4900 provides that any person erroneously convicted of any felony and
3 sentenced to prison may present a claim to the Board for the pecuniary injury sustained as a result of
4 the erroneous conviction. Penal Code section 4903 establishes the requirements which the claimant
5 must satisfy in order to state a successful claim. The claimant must prove all of the following by a
6 preponderance of the evidence:

- 7 1) that the crime with which he was charged was either not committed at all, or, if
8 committed, was not committed by him;
- 9 2) that he did not by any act or omission on his part, either intentionally or negligently,
10 contribute to the bringing about of the arrest or conviction for the crime; and
- 11 3) that he sustained a pecuniary injury through his erroneous conviction and imprisonment.

12 (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7.)

13 If the claimant meets his burden of proof, the Board shall recommend to the Legislature that an
14 appropriation of \$100.00 per day of incarceration served subsequent to conviction be made for the
15 claimant. (Pen. Code, § 4904.)

16 **I. Acero was never required to register as a sex offender.**

17 A person is innocent if the crime charged was not committed at all. (Pen. Code, § 4903; see
18 also, *Diola v. Board of Control, supra*, 135 Cal.App.3d at p. 588.) It is undisputed that Acero was
19 erroneously convicted of a felony for failure to register as a sex offender and no crime was
20 committed.

21 **II. Ineffective Assistance of Defense Attorney is Not Determinative.**

22 Acero argues that his claim should be granted because his pleas were the result of the
23 ineffective assistance of his defense attorneys and not intentional or negligent acts leading to his
24 conviction. This is unpersuasive. Other civil and federal civil rights remedies may be available to
25 defendants who are wrongfully convicted as a result of the wrong-doing of attorneys or government
26 officials.⁸

27
28 ⁸ Possible other claims of actions include civil actions for false imprisonment, malpractice by defense
29 attorneys, and 1983 federal civil rights actions against government officials. (*Perez-Torres v. State of California* (2007) 42 Cal.4th 136 (false imprisonment); *Barner v. Leeds* (2000) 24 Cal. 4th 676 (malpractice by public defender); 42 U.S.C. § 1983 (federal civil rights violations).)

1 Even if Acero's pleas were the result of the ineffective assistance of his defense attorneys,
2 compensation under Penal Code section 4900 is not a fundamental or vested right. (*Tennison v.*
3 *California Victim Compensation and Government Claims Board* (2007) 152 Cal. Appl 4th 1164, 1182.)
4 The Board must apply the legal requirements of Penal Code section 4900, and if those requirements
5 are not satisfied, the Board cannot provide equitable relief based on Acero's constitutional claim of
6 ineffective assistance of his defense attorneys. All the statutory elements of Penal Code section
7 4900 must be met in order for the Board to approve the claim. Here, Acero failed to meet his burden
8 of proving that he is eligible for compensation under Penal Code section 4900.

9 **III. Acero Contributed to His Arrest and Conviction.**

10 Acero's claim for compensation must be denied because the evidence establishes that his
11 conduct contributed to his arrest and conviction for failing to register as a sex offender.

12 The standard for compensation as a wrongfully convicted felon under Penal Code section
13 4900 is whether Acero by any act or omission either intentionally or negligently contributed to his
14 arrest or conviction. (Pen. Code, § 4903.) The scope of the Board's review is not limited to Acero's
15 pleas and includes Acero's conduct leading up to his arrest.

16 Although the abstract of judgment from the 1978 conviction had a typographical error, Acero's
17 conduct contributed to his subsequent arrests and conviction. He was first made aware that he was
18 erroneously identified as a sex offender in 1987. Acero then agreed to register as a sex offender in
19 order to be released on parole. He had the opportunity to correct the record at that time, several
20 years prior to being ultimately arrested and charged with a felony for failure to register in 2002. Acero
21 was not credible when he testified that he believed that he had to register because numerous
22 government officials and defense attorneys told him that he had to register. Although he registered
23 as a sex offender in 1987, the record shows that Acero later did not register on several occasions
24 when he was directed to do so. If Acero believed that he was required to register, he should have
25 registered. Acero, however, also testified that he maintained to his various defense attorneys and
26 others that he never committed any act against a child and did not have to register. If Acero actually
27 believed that he did not have to register, he should have taken steps to legally clear his name, rather
28 than repeatedly failing to register. Each time Acero failed to register, the penalties escalated until he
29 was ultimately arrested and charged with a felony.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

Recommendation

Because it is determined that Acero contributed to his arrest or conviction, Acero is not eligible for compensation under Penal Code section 4900. The issue of whether Acero suffered pecuniary injury is therefore rendered moot.

Date: December 14, 2007



Roslyn Mack
Hearing Officer
Victim Compensation and
Government Claims Board