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

9 In the Matter of the Claim of:

10 **ARTURO CORTEZ**

11 Claim No. G 550003

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

12 Pursuant to California Code of Regulations, Title 2, § 617.6 and upon agreement of the
13 parties, an informal hearing based on the written record was held by Kyle Hedum, Hearing Officer,
14 who was assigned to hear this matter by the Executive Officer of the Victim Compensation and
15 Government Claims Board (Board).
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17 David J. Zugman, Attorney at Law, represented the claimant, Arturo Cortez (Cortez).

18 Michael O'Reilly, Deputy Attorney General, represented the California Department of
19 Justice, Office of the Attorney General (AG).
20

21 **Evidence Submitted**

22 The following documents were submitted into evidence by Cortez:

23 Exhibit A. Magistrate Judge's Report and Recommendation dated March 28, 2003

24 Exhibit B. Ninth Circuit Memorandum dated May 4, 2004

25 Exhibit C. Police Report dated February 6, 1998

26 Exhibit D. Letter from Lucio Morales dated June 25, 1998

27 Exhibit E. Declaration of Lucio Morales dated February 20, 2001

28 Exhibit F. Declaration of Petitioner dated August 21, 2004
29

1 Exhibit G. Claim Form dated October 5, 2004

2 Exhibit H. Letter Brief dated July 22, 2005

3 In opposition to the claim, the AG submitted the following documents into evidence:

4 Exhibit 1. Police Report dated February 6, 1998.

5 Exhibit 2. Jury Trial Reporter's Transcript – Volume 1

6 Exhibit 3. Jury Trial Reporter's Transcript – Volume 2

7 Exhibit 4. Jury Trial Reporter's Transcript – Volume 3

8 Exhibit 5. Jury Trial Reporter's Transcript – Volume 4

9 Exhibit 6. Jury Trial Reporter's Transcript – Volume 5

10 Exhibit 7. Court of Appeal Decision dated August 3, 2000

11 Exhibit 8. Letter Brief dated February 28, 2005

12 Exhibit 9. Letter Brief dated August 5, 2005

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14 **Evidence and Arguments Presented**

15 Cortez lived at 5109 South Compton Avenue, Los Angeles, California, in the front apartment
16 of a duplex with his wife and three children. Beginning February 1998, Lucio Morales (Morales)
17 rented the rear apartment of the duplex.

18
19 On February 5, 1998, detectives Donald Walthers and Dae Won Kim conducted surveillance
20 of the duplex after receiving information from a confidential informant that drugs were being sold at
21 that location by a Hispanic male. The detectives observed a black male drive to the residence and
22 knock on the door of the front apartment. Cortez answered the door, spoke with the other person,
23 and then went back inside his residence while the other person remained outside. Cortez returned
24 within one minute and appeared to hand something to the other person, who then drove off.
25 Detectives attempted to follow but were unsuccessful, so they returned to the duplex.

26
27 Cortez was then observed carrying an off-white lock box from the front apartment to the rear
28 apartment, which he appeared to unlock with a key. He entered the rear apartment and then returned
29 to the front apartment without the lock box. He returned to the rear apartment a second time carrying

1 a white plastic bucket. He entered the rear apartment and came out without the plastic bucket. He
2 then appeared to lock the door to the rear apartment and returned and entered the front apartment.

3 Cortez and an unidentified Hispanic male subsequently left the front apartment in a green
4 Ford Escort. The detectives followed this vehicle for a period of time. The driver of the vehicle
5 appeared to engage in counter-surveillance tactics by circling a block on two occasions and by
6 making an abrupt right turn, pulling up next to the curb. This vehicle eventually stopped and Cortez
7 and the Hispanic male left the vehicle and returned shortly. The detectives followed the vehicle and
8 observed Cortez and the Hispanic male return to and enter Cortez's apartment.

9
10 A short time later, Cortez left the front apartment accompanied by a small male child and a
11 female later identified as Margarita Rodriguez (Rodriguez), who is Cortez's wife. The three got into
12 the Ford Escort while the Hispanic male got into a white Geo. Both vehicles left the area together.
13 The vehicles met again at 52nd Street west of Hooper. The Hispanic male and Cortez talked while
14 Rodriguez went into a school and returned with a small male child.

15 After Cortez, Rodriguez, and the two children got back into the Ford Escort, the detectives
16 decided to stop the vehicle and requested assistance from an unmarked police car. Detective Shake
17 and Officer Watson activated the red emergency lights in their unmarked vehicle and pulled in behind
18 Cortez, who was stopped at an intersection waiting for pedestrians to cross. The detective and the
19 officer were wearing blue nylon jackets with "Los Angeles Police" markings on the front, rear, and
20 shoulder patches. They left their vehicle and approached Cortez's vehicle and identified themselves
21 as peace officers. Cortez accelerated forward, nearly striking Officer Watson. Passenger Rodriguez
22 was observed tossing a set of keys out of the passenger window. The keys were recovered and were
23 later determined to be keys to Cortez's apartment. Cortez eventually came to a stop in a muddy hole
24 in a construction area. After his arrest, Cortez apologized to Detective Walthers and told the
25 detective that he was scared because he was on parole.

26
27 Cortez gave permission to search the front apartment and no contraband was discovered.
28
29 Cortez denied dominium and control over the rear apartment and told detectives that he had never

1 been in the apartment and that he had no keys for it. Detective Walthers used the set of keys
2 recovered from Cortez to open the door to the rear apartment. He immediately smelled a strong odor
3 of marijuana. Upon a search of the rear apartment, two lock boxes and two white plastic buckets with
4 lids were discovered. The keys recovered from Cortez also opened the lock boxes, which contained
5 a large quantity of cocaine. The plastic bins contained a total of five large Ziploc bags of marijuana.
6 A loaded .357 caliber revolver was also located in the rear unit. Cortez first denied any knowledge of
7 the drugs found in the rear apartment, but he later admitted to detectives that he stored the narcotics
8 for his friend Morales.

9
10 Cortez was charged with possession of cocaine for sale, in excess of one kilogram,
11 possession of marijuana for sale, and possession of a handgun by a felon.

12 At Cortez's jury trial, witness Rodriguez testified that she aware that the locks to the rear
13 apartment were changed at the beginning of February 1998. She also testified that she was present
14 on the morning of February 5, 1998, when Morales gave two keys to her husband. Rodriguez also
15 testified at trial that of the three cell phones found in the Ford Escort following the vehicle stop, only
16 one belonged to her and she did not know who owned the other two.

17
18 Cortez expected Morales to testify that Morales went to a police station shortly after Cortez
19 was arrested and told Detective Walthers that the gun, cocaine and marijuana were his. However,
20 Morales did not testify at trial because he was incarcerated in Arizona on drug charges and was not
21 subpoenaed by the defense.

22 Detective Walthers testified that he spoke with Morales regarding the drugs and gun found in
23 the rear apartment. Detective Walthers determined that Morales did not have sufficient knowledge
24 regarding quantity and packaging of the drugs and therefore he was not considered a suspect.
25 Detective Walthers subsequently spoke with jailers at the Southwest Jail and was informed that
26 Cortez made an hour-long phone call to an unidentified person from the jail prior to being interviewed
27 by Detective Walthers. This phone call took place prior to Morales appearing at the police station
28 claiming ownership of the gun and drugs.
29

1 Cortez took the stand and denied possessing the drugs and guns. Cortez testified that
2 Morales gave him four keys on the morning of February 5, 1998. Cortez also stated that one of the
3 cell phones located in the ford Escort belonged to his wife, one belonged to him, and the ownership of
4 the third cell phone was unknown.

5 Cortez introduced a copy of a receipt that purported to show that Morales purchased new door
6 locks for the rear apartment on February 4, 1998. In rebuttal, testimony from the owner of the
7 hardware store proved that the original receipt was dated April 3, 1998, two months after Cortez's
8 arrest, suggesting that the receipt introduced by Cortez had been altered. Cortez could not explain
9 the difference in the dates.
10

11 After testifying that he was telling the truth about what happened on February 5, 1998, Cortez
12 admitted that he had lied to law enforcement officers in previous contacts by giving false names and
13 false dates of birth.

14 Cortez was convicted on October 15, 1998, of possessing marijuana and cocaine for sale
15 (Health and Safety Code §§ 11351 & 11359.) He was acquitted of the firearm possession charge.
16 Cortez admitted to four separate prior prison terms consisting of kidnapping (1984), ex-felon in
17 possession of a firearm (1988), and two separate terms for possession of a controlled substance
18 (1989 and 1995). He also admitted to one prior "strike" conviction within the meaning of the "Three
19 Strikes" law. Cortez was sentenced to sixteen years and four months in state prison.
20

21 In his appeal, Cortez argued that the jury would not have convicted him had his trial attorney
22 been effective in securing the testimony of Morales at Cortez's trial. The appellate court held that
23 even if Morales' admission had been presented to the jury, there was still sufficient evidence that
24 Cortez was guilty of possessing marijuana and cocaine for sale, and affirmed the jury's verdict.
25

26 The court, in a subsequent habeas corpus proceeding, disagreed and held that if the jury had
27 been presented with evidence that Morales admitted to owning the drugs and weapon found in the
28 rear apartment, there was a reasonable probability that the outcome of Cortez's trial would have been
29 different. The court held that the failure to present this evidence constituted ineffective assistance of

1 counsel and ordered Cortez released from custody. Cortez was released from confinement on May
2 23, 2003, after serving 1,680 days subsequent to his conviction.

3 Findings of Fact

4 1. It is found that Cortez acted in a manner consistent with that of a person conducting
5 drug transactions by the observed exchange at the front door with the black male

6 2. It is found that Cortez's statement to detectives that he fled the scene of the traffic stop
7 because he was afraid and because he was on parole was truthful. It is further found that his
8 subsequent assertion that he was not aware that the detective and officer were peace officers is not
9 credible.

10 3. It is found that the car driven by Cortez on the day of his arrest contained indicia of drug
11 transactions consisting of suspected pay-owe slips¹ in a memo book.

12 4. It is found that Cortez carried one off-white lock box from the front apartment to the rear
13 apartment.

14 5. It is found that Cortez carried one white plastic bucket from the front apartment to the rear
15 apartment.

16 6. It is found that the two white plastic buckets located in the rear apartment each contained
17 five Ziploc bags of marijuana with a total weight of nearly one kilogram.

18 7. It is found that the two lock boxes located in the rear apartment contained approximately
19 two kilograms total weight of cocaine packaged in five Ziploc baggies, with one lock-box containing
20 two Ziploc bags of cocaine and the other lock box containing three Ziploc bags of cocaine.

21 8. It is found that Cortez had in his possession keys to the rear apartment and keys for the
22 two lock boxes found in the rear apartment

23 9. It is found that Cortez's credibility was severely damaged when it was proven that the
24 receipt from the hardware store was altered to reflect a date consistent with his defense.
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29 ¹ Pay-owe slips are slips of paper kept by drug dealers that document drug transactions.

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2 10. It is found that Cortez was imprisoned for 1,658 days subsequent to his conviction for
3 possessing cocaine and marijuana for sale.

4 11. It is found that Cortez was not employed at the time of his arrest on February 5,
5 1998.

6 12. It is found that Morales' credibility was damaged when he described two different
7 scenarios of how he came to be aware that Cortez had been arrested. In a declaration dated June 25,
8 1998, he stated "I got a call that my landlord had been taken into custody and that my house was
9 surrounded by narcs and that they had gone into my apartment and took out my two safety boxes and
10 a white bucket with a lid." In a subsequent declaration dated February 20, 2001, he stated, "I
11 returned to my apartment located at 5109 ½ South Compton Avenue, in the city of Los Angeles when
12 my neighbor approached me. My neighbor informed me that the police went into my apartment and
13 came out with two safety (lock) boxes and a white bucket. My neighbor stated that my landlord,
14 Arturo Cortez, was subsequently arrested for the contents in the two lock boxes and the white
15 bucket."

16 13. It is found that Morales' admission to police regarding his ownership of the cocaine
17 was not credible because he was not able to accurately describe the contraband. Morales stated that
18 the cocaine in one lock box weighed a full kilogram and described the cocaine being wrapped in
19 brown tape. According to Morales, the second lock box contained an unknown number of bags of
20 cocaine.
21

22 14. It is further found that Morales' admission to police regarding his ownership of the
23 cocaine was not credible because he stated that the cocaine was given to him as a gift. The street
24 value of the cocaine found in the two lock boxes was estimated to be \$180,000.

25 15. It is found that Morales' admission to police regarding his possession of the marijuana
26 was not credible. Morales described each bucket as containing five Ziploc bags of marijuana
27 purchased for an amount that he could not remember. The police report indicates that the two
28 buckets contained a total of five Ziploc bags of marijuana with an estimated street value of \$80,000.
29

Determination of Issues

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2 Penal Code section 4903 establishes the requirements for a successful claim for an
3 erroneously convicted felon. The claimant must prove: 1) that the crime with which he was charged
4 was either not committed at all, or, if committed, was not committed by him; 2) that he did not by any
5 act or omission on his part, either intentionally or negligently, contribute to the bringing about of the
6 arrest or conviction for the crime; and 3) that he sustained a pecuniary injury through his erroneous
7 conviction and imprisonment. (Pen. Code, § 4903.) If the claimant meets his burden of proof, the
8 Board shall recommend to the legislature that an appropriation of \$100.00 per day of incarceration be
9 made for the claimant. (Pen. Code, § 4904.)
10

11 The claimant has the burden of proving his innocence by a preponderance of the evidence.
12 (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7.)

13 In reaching its determination of the merits of the claim, the Board may consider the following,
14 but the following will not be deemed sufficient evidence to warrant the Board's recommendation that
15 the claimant be indemnified in the absence of substantial independent corroborating evidence that
16 the claimant is innocent of the crime charged: (1) claimant's mere denial of commission of the crime
17 for which he was convicted; (2) reversal of the judgment of conviction on appeal; (3) acquittal of
18 claimant on retrial; or (4) the failure of the prosecuting authority to retry claimant for the crime. (Cal.
19 Code Regs., tit. 2, § 641.²)
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21 Testimony of witnesses claimant had an opportunity to cross-examine, and evidence to which
22 claimant had an opportunity to object, admitted in prior proceedings relating to the claimant and the
23 crime with which he was charged, may be considered by the Board as substantive evidence. The
24 Board may also consider any information that it may deem relevant to the issue before it. (Reg., §
25 641.)
26

27 Based upon Findings of Fact numbers 1 through 9 and 12 through 14, there is insufficient
28 evidence that Mr. Cortez did not violate Health and Safety Code §11351 and §11359.

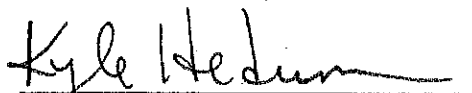
29 ² All citations to regulations are to California Code of Regulations, title 2.

1 After careful evaluation of all of the evidence, there is insufficient evidence that Mr. Cortez: (1)
2 did not violate California Health and Safety Code §11351 and §11359, (2) did not, either intentionally
3 or negligently, contribute to his arrest or conviction for those offenses, and (3) sustained pecuniary
4 injury through his erroneous conviction and imprisonment.

5 **Order**

6 Mr. Cortez's claim under Penal Code sections 4900 *et seq.* is denied.

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8 Date: September 21, 2005

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10 Kyle Hedum
11 Hearing Officer
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