

1
2
3
4
5
6 **BEFORE THE VICTIM COMPENSATION BOARD**
7 **OF THE STATE OF CALIFORNIA**
8

9 In the Matter of the Claim of:

10 **Rafael Madrigal**

11 PC 4900 Claim No. 11-ECO-01

Proposed Decision Post-Madrigal

(Penal Code § 4900 et seq.)

12
13 **I.**

14 **INTRODUCTION**

15 On October 5, 2011, Rafael Madrigal (Madrigal) filed an application for compensation as an
16 erroneously convicted person pursuant to Penal Code section 4900. Madrigal requested \$281,700 for
17 serving 2,817 days imprisonment on an attempted murder conviction that was vacated by a federal
18 court for ineffective assistance of counsel. A hearing ensued on June 3, 2013, at which Madrigal
19 testified. On March 24, 2014, the California Victim Compensation Board (CalVCB) denied Madrigal's
20 application for failing to prove by a preponderance of evidence that he was actually innocent.

21 Thereafter, Madrigal successfully pursued a writ of mandate to the California Court of Appeal,
22 Second Appellate District, which held that CalVCB had failed to accord the requisite deference
23 mandated by Penal Code section 1485.5 to the federal court's factual findings.¹ Consequently, a
24 second hearing ensued on July 10, 2017, conducted by Senior Attorney Laura Simpton of CalVCB.
25 Madrigal did not attend. Instead, his counsel Alexander Simpson and Raquel Cohen of the California

26
27 ¹ Pen. Code, § 1485.5, subd. (c) ("express factual findings made by the court, including credibility
28 determinations, in considering a petition for habeas corpus, ... shall be binding on ... the California
Victim Compensation Board").

1 Innocence Project (CIP) appeared, as well as Deputy Attorney General Kenneth Sokoler on behalf of
2 the California Attorney General (AG).

3 After considering the entire administrative record from the first and second CalVCB
4 proceedings, and giving binding effect to the federal court's factual findings, the application is hereby
5 recommended for denial because Madrigal has failed to prove, by a preponderance of the evidence,
6 that he is innocent of the crime for which he was charged and convicted. The evidence includes
7 three separate identifications of Madrigal as the shooter, Madrigal's own inculcating and inconsistent
8 statements, and a confession by Madrigal's codefendant, in comparison to an alibi defense from
9 Madrigal's employer and seemingly exculcating statements by Madrigal's codefendant. On balance,
10 the evidence does not show that Madrigal is more likely innocent, than guilty, of attempted murder.

11 II.

12 PROCEDURAL HISTORY

13 On July 20, 2000, Madrigal was arrested and subsequently charged with attempted murder,
14 plus an enhancement for personally discharging a firearm causing great bodily injury, and another
15 enhancement for benefiting a criminal street gang.² Francisco Oliveras (Oliveras) was charged as an
16 accomplice to the attempted murder.

17 Madrigal and Oliveras were tried together before a single jury in Los Angeles County Superior
18 Court. On January 18, 2002, after four days of deliberations, the jury found Madrigal and Oliveras
19 guilty as charged.

20 Over a year later, Madrigal filed a motion for new trial based upon newly discovered exculpatory
21 evidence. After a hearing, the motion was denied on September 26, 2003. Thereafter, Madrigal was
22 sentenced to an indeterminate term of 27 years to life. Oliveras received a sentence of 25 years to life
23 imprisonment.

24
25
26
27
28 ² Pen. Code, §§ 664/187, 12022.53, subd. (d), 186.22, subd. (b)(1).

1 Madrigal appealed to the California Court of Appeal, Second Appellate District, which upheld his
2 conviction in an unpublished decision on October 17, 2005. The California Supreme Court denied
3 review on January 4, 2006.

4 Madrigal next filed a petition for writ of habeas corpus in the California Supreme Court on
5 October 31, 2006. The petition alleged multiple claims of ineffective assistance of counsel for failing to
6 investigate and present exculpatory evidence. Numerous exhibits were attached. The California
7 Supreme Court denied the petition on June 13, 2007, leaving Madrigal's conviction and sentence intact.

8 On November 1, 2007, Madrigal filed a federal habeas petition in the United States District
9 Court for the Central District of California, raising the same claims of ineffective assistance of counsel
10 and attaching the same exhibits as his state petition. On July 15, 2009, after an evidentiary hearing,
11 the magistrate judge concluded that counsel's performance was constitutionally ineffective for failing to
12 investigate and present exculpatory evidence of an alibi and third-party culpability, and that the state
13 court's contrary conclusion was an unreasonable application of controlling Supreme Court precedent.
14 The district court agreed and granted habeas relief on September 3, 2009, allowing 60 days for the
15 prosecution to retry Madrigal. One month later on October 1, 2009, the magistrate judge granted
16 Madrigal's motion for release on bail.

17 Madrigal was released from prison on October 6, 2009, after having served a total of 3,366 days
18 for Aguilera's attempted murder.³ Over the next year and a half, the Los Angeles District Attorney
19 obtained numerous continuances to retry Madrigal while conducting additional investigation. But, at a
20 hearing on July 29, 2011, the Los Angeles County Superior Court granted Madrigal's motion to dismiss
21 the case after the prosecution announced it was unable to proceed.

22 On October 5, 2011, Madrigal filed the underlying application for compensation as a
23 wrongfully convicted person pursuant to Penal Code section 4900. Under then-existing law,⁴ the
24 application requested compensation in the amount of \$281,700, representing \$100 for each of the

25
26 ³ AR 2876. Madrigal's release date is based upon the representation in his CalVCB application. The
AG does not dispute this representation and has offered no evidence to support or refute it.

27 ⁴ Former 4904 (West 2011 ed.), added by Stats. 2000 ch. 630 § 1 (AB 1799) (calculating compensation
28 at \$100 daily rate and only for the period of post-conviction imprisonment).

1 2,817 full days served in prison following his conviction on January 18, 2002, until the day of his
2 release on October 6, 2009.⁵ The AG submitted a response letter and numerous exhibits on March
3 18, 2013.⁶

4 On June 3, 2013, CalVCB Hearing Officer James Reinmiller conducted a hearing on
5 Madrigal's application, attended by Madrigal, his CIP counsel Mr. Simpson, and Deputy Attorney
6 General Sean McCoy on behalf of the AG. Madrigal was the sole witness to testify. No other
7 evidence was presented.

8 The hearing officer issued a proposed decision on February 14, 2014, recommending
9 denial of the application for failing to prove Madrigal's innocence by a preponderance. As part of the
10 analysis, the proposed decision concluded that CalVCB was not bound under Penal Code section
11 1485.5 by the federal court's factual findings and credibility determinations. On March 24, 2014, the
12 Board adopted the proposed decision by a two-to-one vote.

13 Following the Board's denial, Madrigal filed a petition for writ of mandate in the Los Angeles
14 County Superior Court, arguing that CalVCB's decision failed to accord the requisite deference
15 mandated by Penal Code section 1485.5 to the federal court's findings. The superior court upheld
16 CalVCB's decision. Madrigal appealed to the Court of Appeal, Second Appellate District. In *Madrigal*
17 *v. California Victim Comp. & Government Claims Bd.* (2016) 6 Cal.App.5th 1108 (*Madrigal*), a majority
18 of the appellate court reversed CalVCB in a published decision issued December 20, 2016.
19 Significantly, the *Madrigal* majority explicitly recognized that the federal court's findings were not
20 "tantamount" to a finding of innocence and "fell short of that standard."⁷ The majority therefore directed
21
22
23

24 ⁵ AR 2864, 2876. If partial days are included, Madrigal actually served 2,819 days post-conviction (i.e.,
25 January 18, 2002, to October 6, 2009), plus 547 days pre-conviction (i.e., July 20, 2000, to January 18,
26 2002), for a total term of 3,366 days. (Cf. Pen. Code, § 2900.5 (calculating jail credits by including
partial days).

27 ⁶ AR 289-313.

28 ⁷ *Madrigal, supra*, 6 Cal.App.5th at p. 1119.

1 CalVCB “to hold a new compensation hearing that gives binding effect to the district court’s habeas
2 corpus findings....”⁸

3 Meanwhile, on December 31, 2015, Madrigal moved the federal district court for a finding of
4 innocence under Penal Code section 1485.55.⁹ The motion was denied on February 18, 2016,
5 “[b]ecause the Court is aware of no *federal* basis for the Motion....”¹⁰

6 In April 2017, the parties submitted supplemental briefing to CalVCB concerning the impact of
7 the appellate court’s decision upon Madrigal’s application for compensation. A second CalVCB hearing
8 took place on July 10, 2017. Madrigal did not attend. Instead, his counsel Mr. Simpson and Ms. Cohen
9 of CIP appeared, as well as DAG Sokoler on behalf of the AG. No new evidence was presented. The
10 record closed 30 days later on August 9, 2017, to allow for supplemental briefs on any issue discussed.
11 None were received.

12 III.

13 **FACTUAL SUMMARY**¹¹

14 On Wednesday, July 5, 2000, between 3:15 and 3:20 p.m., Ricardo Aguilera (Aguilera) was
15 shot in the head while standing in front of the home of his friend, Michael “Porky” Moreno (Porky),¹²
16 located in East Los Angeles. Porky was affiliated with the Marianna gang, and their rival was the Ford
17 gang. Aguilera survived.

18
19 ⁸ *Id.* at pp. 1119-1120.

20 ⁹ Pen. Code, § 1485.55, subd. (f) (“If a federal court, after granting a writ of habeas corpus, pursuant to
21 a nonstatutory motion or request, finds a petitioner factually innocent by no less than a preponderance
22 of the evidence that the crime with which he or she was charged was either not committed at all or, if
23 committed, was not committed by him or her, the board shall, without a hearing, recommend to the
24 Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.”)

25 ¹⁰ Order (2/18/16) at p. 1 (emphasis in original), submitted via email on July 10, 2017.

26 ¹¹ This summary is based upon the entire record before CalVCB, which includes the trial transcript,
27 transcript of the motion for new trial hearing and exhibits, transcript of the federal evidentiary hearing
28 and exhibits, and transcript of post-habeas law enforcement interviews with multiple witnesses.

¹² Michael Moreno’s nickname Porky was not mentioned during the trial proceedings. Nonetheless,
other evidence before CalVCB confirms that Michael Moreno was also known as Porky. (AR 584, 586,
598, 1332, 1396-1397.) Throughout this Proposed Decision, Michael Moreno is referred to by his
nickname Porky for clarity and context. Specifically, other witnesses refer to him solely by his
nickname, and another witness shares the same last name. No disrespect is intended.

1 Moments before the shooting, Aguilera and Porky were outside when a black truck slowly drove
2 by. Porky recognized the driver as Oliveras, who was a Ford member known as “Go-Go.”¹³ Oliveras
3 and his passenger were looking at Aguilera. Afraid, Porky hurried inside with Aguilera, but Porky’s
4 brother Carlos Moreno (Carlos) and Aguilera immediately went outside to warn the neighborhood kids
5 playing in the street. One of those kids was Salvador H. (Salvador), who was riding his skateboard
6 nearby.¹⁴

7 Just as Aguilera was standing on the driveway to Porky’s home, the black truck returned. The
8 truck stopped a few steps from Aguilera, with the passenger’s side closest to him. The passenger
9 leaned his head outside the opened window and repeatedly demanded to know where Aguilera was
10 from, which Aguilera understood to mean his gang affiliation. Aguilera responded “nowhere.” The
11 passenger then pulled out a gun and fired several shots, one of which hit Aguilera in the back of his
12 head.¹⁵ Aguilera fell to the ground, lying face down in a pool of his own blood.¹⁶

13 Aguilera, Carlos, and Salvador all separately identified Madrigal as the shooter. At the time of
14 shooting, Madrigal was an active Ford gang member known as “Mugsy,” even though he was
15 married, employed, and owned a home in Mira Loma.¹⁷ Madrigal was 25 years old and wore a
16 mustache that extended past the sides of his mouth but his chin was clean-shaven.¹⁸

17 **A. Eyewitness Identifications**

18 At the hospital, Aguilera told police that he had seen the shooter multiple times before at
19 Baby’s Liquor, which was a Ford hangout.¹⁹ Shortly thereafter, Aguilera selected Madrigal’s
20 photograph from a photographic lineup, although he noted that Madrigal’s facial features appeared
21

22
23 ¹³ AR 1395, 1529.

24 ¹⁴ The last name of this juvenile witness is omitted to protect his privacy.

25 ¹⁵ AR 1166-1182.

26 ¹⁶ AR 1307-1322.

27 ¹⁷ AR 1535-1540, 1577-1579, 1888-1889.

28 ¹⁸ AR 1675-1680, 2298.

¹⁹ AR 1184, 1557.

1 the same as the shooter but his complexion was darker.²⁰ The photograph of Madrigal was taken
2 when he was about 17 years old.²¹ The photographic lineup included another Ford gang member
3 named Manuel “Dreamer” Mendoza (Mendoza), whom Aguilera did not identify.²² At trial, Aguilera
4 denied seeing the shooter in the courtroom and further asserted that the person he had previously
5 identified was actually the driver, not the shooter.²³ Aguilera did not believe that the shooter was
6 wearing a hat at the time of the shooting.²⁴

7 Carlos initially identified Madrigal as the shooter from a Ford “gang book” that included over
8 100 photographs of different Ford members.²⁵ Carlos also identified Madrigal as the shooter from the
9 same photographic lineup that was shown to Aguilera, which included Mendoza’s photograph.²⁶ At
10 trial, Carlos again identified Madrigal as the shooter.²⁷ Carlos described the shooter as 20 to 25
11 years old, with a shaved head and a light goatee or mustache.²⁸ Significantly, Carlos insisted that
12 the shooter’s goatee or mustache more closely resembled Madrigal’s photograph, than Mendoza’s, in
13 the photographic lineup.²⁹ Carlos also insisted that the shooter was wearing a white baseball cap
14 with an orange brim.

15 However, at a live lineup conducted in July 2001, Carlos failed to identify Madrigal or any
16 other participant as the shooter.³⁰ Just two months earlier in May 2001, Carlos’ brother Porky had
17 been shot and “grazed” in the face, his mother had been followed, and someone had sent Carlos’

18
19 ²⁰ AR 1185-1189, 1194, 1559-1560; see also AR 2863 (Trial Ex. 7, number 116109).

20 ²¹ AR 38; see also AR 1522 (gang expert opining Madrigal “looks a little bit older but he basically still
has the same features”).

21 ²² AR1517-1518; see also AR 2863 (Trial Ex. 7, photograph number 200982).

22 ²³ AR 1188-1189.

23 ²⁴ AR 1196.

24 ²⁵ AR 1934.

25 ²⁶ AR 1324-1326, 1349-1352, 1372; AR 2863 (Trial Ex. 7).

26 ²⁷ AR 1323.

27 ²⁸ AR 1351-1352, 1377.

28 ²⁹ AR 1359; AR 3863 (Trial Ex. 7).

³⁰ AR 1327-1334, 1382-1385.

1 family copies of the police report from Aguilera's shooting.³¹ Carlos was worried for his family's safety
2 at the time of the lineup, but he insisted that was not the reason he failed to identify anyone.³²

3 Salvador unequivocally identified Madrigal as the shooter at trial.³³ Salvador recalled the
4 shooter had a shaved head and a mustache that resembled a goatee but the chin area was shaved
5 off.³⁴ Salvador did not recall whether the passenger was wearing a baseball cap.³⁵ Salvador
6 believed he had previously identified Madrigal from a photographic lineup, but that lineup was
7 apparently for Oliveras, not Madrigal.³⁶

8 A few days after the shooting, Salvador was skateboarding when he happened to see the
9 same black truck parked in front of a house on Ferguson Drive. Salvador notified the police. Police
10 discovered that Oliveras lived on Ferguson Drive. The truck was registered to "Dennis Casares," but
11 no one by that name could be located.

12 **B. Madrigal's Admissions**

13 On June 29, 2000, Ford member Marcus "Fat Boy" Torres (Torres) was shot and killed by a
14 Marianna gang member. Law enforcement believed that Aguilera's shooting on July 5, 2000, was in
15 retaliation for Torres' murder.³⁷ Madrigal's admissions during the new trial proceeding reveal his
16 connection to both Torres and Aguilera, as detailed below.³⁸

17 Shortly after Torres was shot, multiple Ford members, including Madrigal, gathered together in
18 front of the home belonging to Madrigal's sister Lorena Parra (Lorena) in East Los Angeles.³⁹ Another
19

20 ³¹ AR 1327-1334, 1382-1385.

21 ³² AR 1327-1333; see also AR 1397 (mother's testimony).

22 ³³ AR 1274-275.

23 ³⁴ AR 1289.

24 ³⁵ AR 1268-1306.

25 ³⁶ AR 1275-1277, 1585; see also AR 40 (R&R at 6, fn. 6).

26 ³⁷ AR 1487-1488.

27 ³⁸ AR 1888 (discussing Ex. C); AR 536-538 (typed version of Ex. C); AR 524-525 (authenticating typed
28 version of Ex. C); see also AR 1867-1868, 1904-1905, 1923-1924 (discussing Defense Ex. A).

³⁹ AR 36, 45, 536-538, 1894-1896, 1904-1905, 1913-1914.

1 Ford member lived next door to Lorena. But when the group began talking about retribution for Torres'
2 murder, four Ford members retired to the bathroom inside Lorena's home to continue this discussion in
3 private.⁴⁰ The foursome included Mendoza. Madrigal admitted being present inside the bathroom,
4 ostensibly to tell the foursome to leave, when the name "Porky" was suggested as the next Marianna
5 target to avenge Torres' death.⁴¹

6 Madrigal knew Mendoza well.⁴² On May 27, 2000, Mendoza told Madrigal that he had just "lit
7 up" Marianna member Steven "Pollo" Romero (Romero) at Baby's Liquor, and even displayed the gun
8 he used to commit the shooting.⁴³ In June 2000, Mendoza also told Madrigal that he had "just blasted"
9 a Marianna gang member called "Largo."⁴⁴ Perhaps not coincidentally, Mendoza was in a blue Astro
10 van when he shot "Largo," and Madrigal also owned a blue Astro van.⁴⁵ In addition, Mendoza was
11 arrested in June 2001, while in possession of the same gun used to shoot Aguilera in July 2000.⁴⁶
12 According to a gang expert, gang members commonly "float" or pass guns to one another because
13 guns are a scarce commodity.⁴⁷

14 Significantly, around the same time Madrigal accused Mendoza of being the real culprit in
15 Aguilera's shooting, Madrigal provided Mendoza with a signed "declaration," in which Madrigal admitted
16 that he had "lie[d] to implicate these other people."⁴⁸ Mendoza's family gave this "declaration" to the
17 prosecution at Madrigal's new trial hearing, just before Mendoza was called as a witness and invoked
18 his Fifth Amendment right not to testify. Madrigal admitted the declaration was authentic but claimed it
19
20

21 ⁴⁰ AR 536.

22 ⁴¹ AR 524-525, 536, 1888.

23 ⁴² See AR 1543, 2294.

24 ⁴³ AR 36, 45, 536, 1578, 1927, 1891-1893, 1909-1912.

25 ⁴⁴ AR 1893.

26 ⁴⁵ AR 1912-1913.

27 ⁴⁶ AR 835, 873-874.

28 ⁴⁷ AR 1937.

⁴⁸ AR 507, 1867-1868, 1904-1905, 1923-1924 (Defense Ex. A).

1 was coerced by Oliveras.⁴⁹ Considering the nature and number of these contacts between Madrigal
2 and Mendoza, Madrigal was close friends with Mendoza.

3 Madrigal also knew Oliveras. After his arrest, Madrigal told police that he last saw Oliveras at
4 a hamburger stand that was a known Ford hang-out in East Los Angeles, supposedly in April 2000,
5 with Torres. Oliveras also confided to Madrigal, at some unspecified time, that the truck used in the
6 shooting belonged to Oliveras' brother-in-law, and Oliveras could not get rid of the truck because he
7 had only borrowed it.⁵⁰ Madrigal acknowledged that gang members do not share details of their
8 crimes with anyone not involved in that crime, not even fellow gang members.⁵¹

9 Finally, Madrigal admitted, under oath, that he was a Ford member in 2000, although he
10 subsequently testified under oath that he was not.⁵²

11 **C. Oliveras' Admissions**

12 In a 2011 interview, Oliveras admitted to law enforcement that Madrigal shot Aguilera, and
13 he (Oliveras) was the accomplice. Oliveras explained that Aguilera's shooting was not planned.⁵³
14 Instead, he and Madrigal happened to drive up to the same hamburger stand that afternoon,
15 presumably the hamburger stand where Madrigal admitted he last saw Oliveras.⁵⁴ Around the same
16 time they arrived, "somebody ... passed by talking shit..."⁵⁵ Oliveras added that, "when we passed
17 by," Oliveras saw "Porky" and Aguilera both outside.⁵⁶ Oliveras thought that Madrigal obtained the
18
19
20

21 ⁴⁹ AR 1904-1905 (discussing Defense Ex. A).

22 ⁵⁰ AR 537-538, 1907-1909.

23 ⁵¹ CalVCB Hearing (06/03/13) at 1:01:48-1:08:22, 1:10:09-1:11:11.

24 ⁵² AR 1888-1889.

25 ⁵³ On the day of the shooting, Oliveras was evidently working just a few miles from Madrigal's job and
Oliveras left work before 2:30 p.m. (AR 320-321.)

26 ⁵⁴ AR 594; see also AR 1543, 2294.

27 ⁵⁵ AR 594.

28 ⁵⁶ AR 598 (emphasis added); see also AR 586.

1 gun used to shoot Aguilera from Madrigal's other sister "Lala's" home, because that was "where we
2 kept shit at it [*sic*] his sister's pad."⁵⁷

3 Oliveras made these incriminating statements without any promise of leniency. Oliveras
4 regretted not taking the prosecution's offer of "immunity" to testify against Madrigal, explaining that
5 "[y]ou have certain beliefs you grow up with and ... later on you realize that it's bullshit."⁵⁸ As Oliveras
6 put it, "With time I have fucken matured...." Oliveras offered to testify against Madrigal in exchange
7 for a parole "date."

8 **D. Madrigal's Prior Shooting**

9 On March 9, 2000, Madrigal was arrested for assault with a deadly weapon after having been
10 "identified as being the shooter" by "confidential reliable informants."⁵⁹ This shooting occurred four
11 months before Aguilera's attempted murder. Police seized a shotgun and marijuana from Madrigal's
12 home. Police also found a list of Ford gang members, evidently from an old party flyer, that included
13 "Mugsy" and "Go-Go." At booking, Madrigal admitted his Ford membership without having been
14 advised of his *Miranda* rights.⁶⁰ Madrigal remained in jail for five days but no charges were ultimately
15 filed.

16 Madrigal's prior shooting was not cited by either party during the first CalVCB proceeding or,
17 evidently, during the habeas proceeding in federal court. Consequently, this hearing officer notified
18 the parties at the second CalVCB hearing and invited a response. CIP counsel dismissed the prior
19 shooting as "unrelated" to Madrigal's claim of innocence.⁶¹

22
23 ⁵⁷ AR 589-590, 592, 594.

24 ⁵⁸ AR 588, 591. See also AR 665 (prosecutor confirming that she offered a deal, but not immunity, to
25 Oliveras' attorney in exchange for his testimony against Madrigal at trial, which Oliveras rejected).

26 ⁵⁹ AR 1449, 1453, 1462.

27 ⁶⁰ AR 1445, 1451-1452, 1462-1463; see also *Miranda v. Arizona* (1966) 384 U.S. 436, 467-468
(requiring police to advise a suspect under custodial arrest of his Fifth Amendment rights before
28 questioning).

⁶¹ CalVCB Hrg (07/10/17) at 27:30-32:55.

1 **E. Alibi Defense**

2 On the day of Aguilera’s shooting, Madrigal went to work at Proaction Packaging, located in
3 Rancho Cucamonga approximately 50 minutes away from East Los Angeles. Madrigal’s brother
4 Victor Madrigal (Victor) also worked there, and they carpooled together. According to Madrigal’s
5 timecard, he arrived on July 5, 2000, at 7:25 a.m., left for lunch at 11:30 a.m., and returned at 11:58
6 a.m.⁶² However, Madrigal failed to clock out at the end of the day. Instead, after Victor spoke to their
7 floor supervisor Steven Finley (Finely) the next day, Finley handwrote in Madrigal’s departure time as
8 3:32 p.m.

9 Madrigal claimed that he did not bother to clock out because of a problem with the timeclock,
10 which caused it to stamp the date and time in the row for Monday, instead of Wednesday. Since
11 Proactive Packaging was closed on Monday and Tuesday for the July 4th holiday, the timeclock
12 needed to be adjusted. Nevertheless, the date and times stamped were accurate and only appeared
13 on the wrong row. Rather than clock out, Madrigal supposedly told Victor that Finely would fix it.
14 However, Victor clocked out his own timecard at exactly 3:30 p.m., supposedly because he was
15 new.⁶³

16 Madrigal was the only employee trained to operate a specialized labeling machine, and Victor
17 was his assistant. According to Madrigal’s production log for July 5, 2000, he and Victor operated
18 this machine from 12:00 p.m. to 12:45 p.m., and then again from 1:00 p.m. to 1:20 p.m. At 1:20 p.m.,
19 Madrigal wrote “broke off.” Thereafter, Madrigal and Victor purportedly set up for a different order by
20 loading labels and pre-folding boxes for the next hour and half until 3:00 p.m. Madrigal claimed he
21 “broke off” at 1:20 p.m. because of an incoming “hot” order, which required supervisorial approval and
22 could happen at any time throughout the day. Victor, however, admitted that the machine “broke
23
24
25

26 ⁶² AR 1619-1623, 1683-1684. Unfortunately, a copy of the production log was not included in the
27 CalVCB record.

28 ⁶³ AR 2229-2233; see also Victor Declaration Supplement at pp. 1-9 (received via email on 6/26/17).

1 down” that day.⁶⁴ Regardless, the machine was last used at 1:20 p.m. on July 5, 2000, two hours
2 before Aguilera was shot.⁶⁵

3 Finley believed that Madrigal was at work the entire day. However, Finley acknowledged it
4 was possible for Madrigal to have left up to an hour early (i.e., 2:30 p.m.) without his knowledge.⁶⁶
5 Madrigal’s head supervisor Robert Howards (Howards) was “real certain” that Madrigal remained at
6 work until at least 3:00 p.m., based upon Madrigal’s timecard and production log, Finley’s oversight,
7 and workplace dynamics.⁶⁷ Victor also claimed that he was with Madrigal all day at work, left together
8 at 3:30 p.m., and even remained with Madrigal at his home for another hour, until Madrigal finally
9 dropped Victor off that evening at their parents’ home where Victor resided.⁶⁸

10 **F. Third-Party Culpability Defense**

11 In a jail conversation recorded on August 17, 2001, Oliveras told his girlfriend that he and
12 Madrigal had a fight. Oliveras initially described an incident in which Madrigal wrote a “kite” calling
13 Oliveras and Mendoza “backstabbers” because Madrigal thought they “were talking shit about that
14 fool” but “nothing had to do with nothing about him.” As Oliveras explained, he refused to lend his
15 shirt to Madrigal, who wanted to lend it to another inmate called “Dopey,” because Oliveras knew that
16 Mendoza was going to court with Dopey and “was gunna fuck him up ... so that’s why I didn’t lend
17 him my shirt.”

18 Oliveras next described confronting Madrigal about asking “his brother to go find out who
19 really did it” and “told him it’s none of your business” Madrigal supposedly replied, “[W]ell I’m here
20 for you....” Oliveras responded, “I didn’t put you here... I didn’t hang around with you out there, I
21 don’t hang around with you in here.” When Oliveras found out about Victor’s inquiries, Oliveras told
22 his “homeboy” not to tell “him” anything, so that “none of us told him shit....” Madrigal asked if
23

24 ⁶⁴ AR 377-378, 456.

25 ⁶⁵ AR 422-423, 427, 429-430.

26 ⁶⁶ AR 1647, 1653, 1662, 1669, 1672, 1673.

27 ⁶⁷ AR 430-431, 1619-1623, 1683-1684.

28 ⁶⁸ AR 456.

1 Oliveras thought “I’m going to throw rat,” and Oliveras answered that “it’s better this way that you
2 don’t know nothing....”⁶⁹ Oliveras added, “I know that every time you make a comment – like oh,
3 you’re a killer like you go, ya right.” Oliveras said that the way Madrigal “looks” at him and Mendoza
4 in jail, Madrigal “either already knows but ... he don’t know shit you know... I know he’s been
5 asking....”

6 When his girlfriend worried that “he’s gunna hate you babe,” Oliveras responded, “I don’t
7 really care – it’s not like I was kicking with him out on the street...” Oliveras added,

8 “He don’t know nothing... he can’t throw up ... everybody tells him the same shit
9 like a fool, like I told him that, I told a couple homies that I hope that fool don’t
10 throw rat ... he goes, they care fool cause everything is pointed toward him – if
11 [he] tries to cop out on you that’s going to make him look bad. ...all the fucking
12 people are pointing at him you know – they’re even pointed at your ass.”

13 Oliveras complained again that Madrigal had called him a “backstabber” and described
14 confronting Madrigal about “talking shit behind my back...” Oliveras observed, “He’s hurting, you
15 know, he’s hurting cause I made him look bad, and I go fuck you fool, you know and I felt guilty also
16 (laughs) what can I say, you know.” Oliveras detailed a physical altercation with Madrigal, in which
17 Oliveras “had to deck it out,” but Madrigal “wasn’t even fighting” and “was just trying to push [Oliveras]
18 out of his cell....” Oliveras concluded, “I think that’s why he’s more hurt, you know....”⁷⁰

19 According to Madrigal, this recording from August 2001 was about an argument with Oliveras
20 over Madrigal’s attempt to have Victor find out who shot Aguilera.⁷¹ Madrigal supposedly waited until
21 spring 2001 to ask Victor to investigate the shooting from July 2000.⁷² Madrigal also claimed to have
22 overheard Oliveras and Mendoza make incriminating statements in jail during summer 2001 that
23 caused Madrigal to believe Mendoza shot Aguilera.⁷³

24 ⁶⁹ AR 2248.

25 ⁷⁰ AR 2246-2255; see also Oliveras Audio Recordings (tracks 1-8), received via email on July 3, 2017.

26 ⁷¹ AR 396.

27 ⁷² AR 385-386.

28 ⁷³ AR 387-388.

1 But according to Oliveras, this argument was actually about Porky's shooting, not Aguilera's.⁷⁴
2 Porky was shot and "grazed" in the face in May 2001, when he was expected to be a prosecution
3 witness in the trial for Aguilera's attempted murder. Oliveras heard that Madrigal was trying to find out
4 who had shot Porky, and Oliveras was "tripping" that Madrigal was "going to be a rat." Oliveras heard
5 that Madrigal "supposedly" just wanted to tell the shooter to leave Porky alone. But since Madrigal told
6 the police in his post-arrest interview that he last saw Oliveras with Torres shortly before Torres was
7 murdered, which was incriminating because Aguilera's attempted murder was believed to be in
8 retaliation for Torres's death, Oliveras told "everybody don't tell this fool nothing...."⁷⁵

9 G. Failure to Testify at Trial

10 Throughout the habeas proceedings, Madrigal insisted he remained willing to testify at trial
11 about his alibi and third-party culpability defenses, but his trial attorney Andrew Marc Stein (Stein) did
12 not call him to the stand and never explained why.⁷⁶ But the day before the defense rested, Stein
13 commented on the record, in Madrigal's presence, that "***I intended to put him on the stand before I***
14 ***heard he was a suspect in another 245 shooting...***"⁷⁷ This comment was prompted by the
15 prosecution's late discovery of a police report for the prior shooting, which Stein moved to exclude. The
16 trial court agreed with Stein but warned that, if Madrigal "testifies, he's fair game" for impeachment.⁷⁸
17 The prosecution rested later that day. Thereafter, Stein called several defense witnesses and rested
18 the following day without calling Madrigal, even though Stein had previously told the jury in his opening
19 statement that Madrigal would testify.⁷⁹

20 Unfortunately, Stein did not recall his stated explanation for declining to put Madrigal on the
21 stand when testifying in federal court years later. Incredibly, neither the AG nor Madrigal's habeas
22

23 ⁷⁴ AR 584-587.

24 ⁷⁵ AR 584-587.

25 ⁷⁶ AR 405-406, 518, 525-526

26 ⁷⁷ AR 1460 (emphasis added).

27 ⁷⁸ AR 1453 (discovery objection), 1464-1466 (*Miranda* objection).

28 ⁷⁹ AR 1122.

1 counsel refreshed Stein's recollection or mentioned the prior shooting. Instead, Stein testified in federal
2 court that Madrigal had refused to testify at trial because Oliveras was threatening to kill him and his
3 family.⁸⁰ The federal court credited Madrigal's testimony over Stein's on this issue.⁸¹ Based upon this
4 credibility determination, the federal court concluded that Stein's failure to call Madrigal to testify
5 amounted to ineffective assistance of counsel. The court explained that "there was no reasonable
6 explanation" or "tactical reason" for Stein's omission, which was especially "prejudicial" in light of Stein's
7 earlier promise to the jury that Madrigal would testify.⁸²

8 IV.

9 DETERMINATION OF ISSUES

10 Penal Code section 4900 allows any person, who has been convicted and imprisoned for a
11 felony offense, to apply for compensation from CalVCB.⁸³ If the applicant has obtained a finding of
12 factual innocence for all convictions underlying his imprisonment, then CalVCB must automatically
13 recommend compensation, without a hearing and within 30 days.⁸⁴ Otherwise, the Attorney General is
14 afforded the opportunity to submit a response to the application. Thereafter, the applicant is entitled to
15 a hearing, at which both sides may present evidence in support of, and in opposition to, the application
16 for compensation.⁸⁵

17 CalVCB hearings are informal and the traditional rules of evidence do not apply.⁸⁶ Ultimately, all
18 relevant evidence is admissible "if it is the sort of evidence on which reasonable persons are
19 accustomed to rely in the conduct of serious affairs,"⁸⁷ even if a common law or statutory rule "might

20
21 ⁸⁰ AR 479, 507, 511.

22 ⁸¹ AR 63-65, 68.

23 ⁸² AR 68, 71.

24 ⁸³ Pen. Code, § 4900.

25 ⁸⁴ Pen. Code, § 4902, subd. (a); see also Pen. Code, §§ 851.865, 1485.55 (automatic compensation provisions).

26 ⁸⁵ Pen. Code, § 4902, subd. (b).

27 ⁸⁶ See Cal. Code Regs., tit. 2, § 615.1, subd. (a) ("The formal hearing provisions of the Administrative Procedure Act ... do not apply").

28 ⁸⁷ Cal. Code Regs., tit. 2, § 641, subd. (c).

1 make its admission improper over objection in any other proceeding.”⁸⁸ CalVCB “may also consider
2 any other information that it deems relevant to the issue before it.”⁸⁹

3 At the conclusion of the hearing, CalVCB may recommend compensation only if the applicant
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 that (2) he sustained an injury
6 through his erroneous conviction and imprisonment.⁹⁰ “Preponderance of the evidence” means
7 evidence that has more convincing force than that opposed to it.⁹¹ If the claimant satisfies this burden
8 of persuasion, CalVCB shall recommend to the Legislature an award of compensation equal to \$140
9 per day for every day of time spend in custody.⁹²

10 When determining whether the applicant has satisfied his burden of proof, 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....”⁹³ 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.”⁹⁴ CalVCB may also “consider as substantive evidence
16
17

18 ⁸⁸ Cal. Code Regs., tit. 2, § 641, subd. (d).

19 ⁸⁹ Cal. Code Regs., tit. 2, § 641, subd. (f).

20 ⁹⁰ Pen. Code, §§ 4903, subd. (a), 4904; *Tennison v. Victim Compensation and Government Claims Board* (2006) 152 Cal.App.4th 1164.

21 ⁹¹ *People v. Miller* (1916) 171 Cal. 649, 652.

22 ⁹² Pen. Code, § 4904. Counsel asserted at the second CalVCB hearing that the current statute
23 granting \$140 for each day of the entire period of incarceration should be retroactively applied to
24 Madrigal. The California Court of Appeal, First Appellate District, is considering a related retroactivity
25 issue in *Atkins v. Victim Compensation and Government Claims Board* (B281343). CalVCB typically
26 applies the current statute when granting relief. *Cf. Tennison, supra*, 152 Cal.App.4th at pp. 1181-1182
(finding “application for monetary compensation pursuant to section 4900 is neither fundamental nor
vested” right); *see also Madrigal, supra*, 6 Cal.App.5th at p. 1115 n.6 (retroactively applying clarifying
amendment to Pen. Code, § 1485.5).

27 ⁹³ Cal. Code Regs., tit. 2, § 641, subd. (a).

28 ⁹⁴ Cal. Code Regs., tit. 2, § 641, subd. (a).

1 the prior testimony of witnesses [that] claimant had an opportunity to cross-examine, and evidence
2 admitted in prior proceedings for which claimant had an opportunity to object.”⁹⁵

3 CalVCB’s broad authority to consider all relevant evidence when deciding a claimant’s
4 application for compensation is expressly limited by Penal Code section 4903. Specifically, subdivision
5 (b) of section 4903 provides:

6 “the factual findings and credibility determinations establishing the court’s basis for
7 granting a writ of habeas corpus, a motion for new trial pursuant to Section 1473.6,
8 or an application for a certificate of factual innocence as described in Section
1485.5 shall be binding on the Attorney General, the factfinder, and the board.”⁹⁶

9 Penal Code section 1485.5, in turn, provides that “express factual findings made by the court,
10 including credibility determinations, in considering a petition for habeas corpus ... shall be binding on
11 ... the California Victim Compensation Board.” As *Madrigal* concluded, section 1485.5 binds CalVCB
12 with all findings and credibility determinations rendered by a court when granting habeas relief, even
13 if the habeas proceeding was contested, and even if the findings do not amount to a determination of
14 innocence.⁹⁷ Recent amendments to Penal Code section 1485.5 confirm *Madrigal’s* interpretation of
15 section 1485.5.⁹⁸

16 **A. Credibility Does Not Equal Accuracy**

17 At the threshold, CalVCB rejects *Madrigal’s* assertion that a court’s finding of credibility
18 automatically constitutes a finding of accuracy.⁹⁹ The two concepts are distinct. Credible means
19 believable, whereas accurate means correct.¹⁰⁰ A witness may be convincing yet mistaken. As
20 recognized by the Judicial Counsel of California, “*People sometimes honestly forget things or make*
21

22 ⁹⁵ Cal. Code Regs., tit. 2, § 641, subd. (b).

23 ⁹⁶ Pen. Code § 4903, subd. (b).

24 ⁹⁷ *Madrigal, supra*, 6 Cal.App.5th at pp. 1118-1119.

25 ⁹⁸ Pen. Code, § 1485.5, subd. (c), most recently added by Stats. 2016, ch. 31, § 244 (SB 836), eff. Jun.
26 27, 2016, amend. by Stats. 2016, ch. 785 § 2 SB 1134), eff. Jan. 1, 2017.

26 ⁹⁹ CalVCB Hrg (7/10/17) at 33:20-46:29, 1:20:19-1:22:19.

27 ¹⁰⁰ See Merriam-Webster Online Dict. (2017) <<http://merriam-webster.com/dictionary> (as of Sept. 19,
28 2017).

1 *mistakes about what they remember. Also, two people may witness the same event yet see or hear it*
2 *differently.*¹⁰¹ Given these distinctions, a court's credibility finding requires CalVCB to assume that the
3 witness sincerely testified to the best of his recollection. Nonetheless, the court's credibility finding
4 does not necessarily require CalVCB to assume that the witness' recollection is actually correct.

5 Admittedly, a court's credibility finding may, at times, logically compel CalVCB to accept the
6 truth of a witness' testimony. For instance, if two witnesses testify to opposite facts and a court
7 explicitly finds one witness to be more credible than the other, then CalVCB must accept as true the
8 fact testified to by the credible witness.¹⁰² Similarly, if a credible witness testifies to a fact for which no
9 mistake may be reasonably inferred, then CalVCB must also accept that fact as true.¹⁰³ Otherwise,
10 CalVCB is not bound to assume a witness' testimony is entirely accurate merely because a court found
11 that witness to be credible when granting habeas relief.¹⁰⁴ As the *Madrigal* majority confirmed, a court's
12 decision to grant habeas relief due to ineffective assistance of counsel after comparing the relative
13 weaknesses and strengths of the prosecution's evidence is not tantamount to a determination of
14 innocence; rather, it merely amounts to a finding that a different result was reasonably probable if there
15 had been effective counsel.¹⁰⁵

16 Indeed, any contrary conclusion would compel compensation under Penal Code section 4900
17 for all applicants whose convictions were reversed due to counsel's failure to present exculpatory
18 evidence, regardless of their guilt or innocence. To explain, a defendant challenging his conviction on
19 the basis of ineffective assistance of counsel must demonstrate (1) his counsel's performance fell

21 ¹⁰¹ CALCRIM No. 226 (emphasis added).

22 ¹⁰² For example, the magistrate judge found Madrigal's explanation as to why he did not testify to be
23 more credible than his trial attorney's contrary explanation. CalVCB is therefore bound to assume that
24 Madrigal's explanation is true and his attorney's is not.

25 ¹⁰³ For example, if the magistrate judge hypothetically found that Victor credibly testified he was with
26 Madrigal when punching out his timecard on the day of the shooting, then CalVCB would be required to
27 assume the truth of Victor's alibi testimony.

28 ¹⁰⁴ See *Larsen v. Soto*, 742 F.3d 1083, 1097-1098 (9th Cir. 2013) (acknowledging two witnesses
credibly testified that Larsen had nothing in his hands, yet "it may have been physically possible for
Larsen to throw a knife during a split second when neither of the [witnesses] was paying attention").

¹⁰⁵ *Madrigal*, *supra*, 6 Cal.App.5th at p. 1119.

1 below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for
2 counsel's error, the result of the proceeding would have been different.¹⁰⁶ In order for there to be a
3 reasonable probability of a different result, the excluded exculpatory evidence must have been credible.
4 By definition, the omission of incredible evidence is not prejudicial because incredible evidence is not
5 reasonably likely to sway the jury's verdict. But if a habeas court's finding of credibility must be deemed
6 a finding of accuracy, then compensation must always be granted for counsel's ineffectiveness, even if
7 the omitted exculpatory evidence is not actually true.¹⁰⁷ Although CIP counsel asserted that the
8 Legislature "may well have intended" such a result,¹⁰⁸ the legislative history repeatedly emphasizes
9 that only the "innocent" and "exonerated" merit compensation under section 4900.¹⁰⁹ To avoid such an
10 unintended result, CalVCB must not presume that a habeas court's credibility determination always
11 constitutes a determination of accuracy.

12 This interpretation is consistent with Penal Code section 1485.5, which confirms that only a
13 court's "express" factual findings are binding upon CalVCB. Specifically, subdivision (c) provides that,
14 in "a contested or uncontested proceeding, the *express* factual findings made by the court, including
15 credibility determinations, in considering a petition for habeas corpus... shall be binding on" CalVCB.¹¹⁰
16 Subdivision (d) defines "express factual findings" as those "findings established as the basis for the
17 court's ruling or order."¹¹¹ Plainly understood, section 1485.5 only binds CalVCB to express, not
18 implied, factual findings. Absent an express finding of accuracy, CalVCB is not barred from concluding
19 that, in certain circumstances, a credible witness may nevertheless be mistaken.

20
21 ¹⁰⁶ *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.

22 ¹⁰⁷ For instance, in Daniel Larsen (PC 4900 Claim No. 14-ECO-01), the federal court explicitly stated
23 that its decision to grant habeas relief due to counsel's ineffectiveness for failing to present exculpatory
24 evidence at trial did not amount to a determination that Larsen was actually innocent. (Larsen Post-
Madrigal PD at pp. 14-15.)

25 ¹⁰⁸ CalVCB Hrg (7/10/17) at 1:20:19-1:22:19.

26 ¹⁰⁹ Sen. Com. On Public Safety, Analysis of Sen. Bill No. 618 (2013-2014 Reg. Sess., as amended April
27 15, 2013, pp. 2, 5; Assem. Floor, Analysis of Sen. Bill No. 618 (2013-2014 Reg. Sess., at p. 1
28 (emphasis added), Sept. 5, 2013.

¹¹⁰ Pen. Code, § 1485.5, subd. (c) (emphasis added).

¹¹¹ Pen. Code, § 1485.5, subd. (d) (emphasis added).

1 The legislative history surrounding Penal Code section 1485.5 bolsters this conclusion. Section
2 1485.5 was added by Senate Bill 618, which also added the automatic compensation provisions in
3 Penal Code sections 851.865, 1485.55, and 4902. Senate Bill 618 was intended to “streamline” the
4 process “for compensating persons who have been exonerated after being wrongfully convicted and
5 imprisoned.”¹¹² To that end, sections 851.865, 1485.55, and 4902 mandate compensation, without a
6 hearing and within 30 days, for “exonerated” applicants who have been found by a court to be actually
7 innocent of all convictions underlying their imprisonment.¹¹³ But for applicants with court findings
8 amounting to less than a finding of innocence, section 1485.5 renders those findings binding upon
9 CalVCB. When justifying this provision, the legislative analysis emphasized that “[t]rial courts are
10 trained jurists with substantial trial experience,” whereas CalVCB “hearing officers are not judges,” and
11 their hearings “are not subject to the rules of evidence applicable in trials....”¹¹⁴

12 Thus, section 1485.5 was intended to prevent CalVCB hearing officers from substituting their
13 own factual determinations for those of a judge. Requiring CalVCB hearing officers to always construe
14 a judge’s finding of credibility to mean, instead, a finding of accuracy, would violate the very purpose of
15 section 1485.5. Under section 1485.5, CalVCB hearing officers must apply the facts as determined by
16 the judge, thereby leaving it to the judge to determine whether credible evidence is also accurate.
17 Absent such a finding, CalVCB hearing officers must independently resolve the issue of accuracy after
18 considering the entire administrative record. Accordingly, the legislative history for section 1485.5
19 supports the conclusion that a court’s credibility determination does not necessarily amount to an
20 accuracy determination.

21 Incidentally, the heavy burden imposed on prisoners to obtain federal habeas relief does not
22 entitle CalVCB applicants to a more favorable construction of the federal court’s findings. A state
23

24 ¹¹² Assem. Floor, Analysis of Sen. Bill No. 618 (2013–2014 Reg. Sess., at p. 1 (emphasis added), Sept.
25 5, 2013.

26 ¹¹³ Sen. Com. On Public Safety, Analysis of Sen. Bill No. 618 (2013-2014 Reg. Sess., as amended April
15, 2013, pp. 2, 5.

27 ¹¹⁴ Sen. Com. On Public Safety, Analysis of Sen. Bill No. 618 (2013-2014 Reg. Sess., as amended April
28 15, 2013, p. 14.

1 prisoner seeking federal habeas relief must show that prejudicial constitutional error occurred during
2 the trial proceedings and that the state court's rejection of this claim amounted to an unreasonable or
3 contrary application of controlling Supreme Court precedent.¹¹⁵ Habeas relief is therefore barred, even
4 upon a showing of prejudicial constitutional error, unless "there is no possibility fair minded jurists could
5 disagree that the state court's decision conflicts with [Supreme Court] precedents."¹¹⁶ This intentionally
6 "difficult to meet" standard ensures that federal habeas relief is limited to only "extreme malfunctions in
7 the state criminal justice system."¹¹⁷ Nonetheless, this formidable standard does *not* require a showing
8 of actual innocence. All defendants are entitled to a fair criminal process, even guilty ones.¹¹⁸ By
9 comparison, compensation is only allowed under Penal Code section 4900 upon a showing of actual
10 innocence. Because these standards are entirely different, applicants who have obtained federal
11 habeas relief are not entitled to a more generous interpretation of the federal court's findings.

12 In sum, a court's finding of credibility is not equivalent to a finding of accuracy. CalVCB must
13 assume that a credible witness testified truthfully about his observations, but CalVCB need not assume
14 that the witness' recollection was necessarily correct. Sometimes, logic will compel CalVCB to accept
15 the truth of a credible witness's testimony. Otherwise, CalVCB must consider all of the evidence before
16 it when determining whether the witness' sincere version of events constitutes an accurate depiction of
17 those events.

18 **B. Federal Court's Binding Determinations**

19 Under this approach, CalVCB is bound by the following factual findings from the federal
20 court's decision to grant Madrigal's habeas petition.

24 ¹¹⁵ 28 U.S.C. § 2254(d); *Harrington v. Richter* (2011) 562 U.S. 86; *Brecht v. Abrahamson* (1993) 507
25 U.S. 619.

26 ¹¹⁶ *Harrington, supra*, at p. 102.

27 ¹¹⁷ *Id.* at p. 103.

28 ¹¹⁸ *People v. Harris* (1981) 28 Cal.3d 935, 984 ("The prisoner, whether guilty or not, is unquestionably
entitled by the law of the land to have a fair and impartial trial").

- 1 (1) Oliveras' recorded conversation "*apparent[ly]*" described Madrigal's inquiry into the
2 Aguilera shooting and constituted "compelling evidence of Mendoza's and Olivares's
3 involvement in the shooting, and of [Madrigal's] *apparent* non-involvement."¹¹⁹
- 4 (2) Madrigal's testimony concerning his willingness to testify at trial was more credible
5 than his attorney Stein's version of events.¹²⁰
- 6 (3) Howards was a "credible" alibi witness whose testimony was "certain and
7 unequivocal."¹²¹
- 8 (4) Victor's testimony was "highly corroborative" of Madrigal's alibi defense.¹²²
- 9 (5) The prosecution's case against Madrigal was "relatively weak" and "depend[ed] solely
10 upon conflicting and inconsistent eyewitness accounts."¹²³

11 As definitely resolved by the *Madrigal* majority, none of these findings by the federal court amount to
12 a determination of actual innocence. Rather, the federal court only found "that a different result was
13 reasonably probable if there had been effective assistance of counsel."¹²⁴

14 **C. Madrigal Failed To Demonstrate Actual Innocence**

15 After considering the entire administrative record from both CalVCB proceedings, and giving
16 binding effect to the federal court's determinations set forth above, Madrigal has failed to demonstrate
17 his innocence by a preponderance of the evidence. As detailed below, the evidence implicating
18 Madrigal includes three separate eyewitness identifications, Madrigal's own incriminating statements,
19 Madrigal's identification as the shooter in a second shooting, and Oliveras' confession to their guilt.
20 In addition, Madrigal lacks credibility, with the single exception of his willingness to testify at trial. By
21 comparison, Madrigal's alibi and third-party culpability evidence is unconvincing. On balance, the
22 overall weight of this evidence fails to prove that Madrigal is more likely innocent, than guilty, of
23 Aguilar's attempted murder.

24 ¹¹⁹ AR 58-61(emphasis added).

25 ¹²⁰ AR 65, 68.

26 ¹²¹ AR 79-80.

27 ¹²² AR 84.

28 ¹²³ AR 72, 84.

¹²⁴ *Madrigal, supra*, 6 Cal.App.5th 1108, 1119 (confirming federal court's findings were not "tantamount to finding him actually innocent" and "fell short of that standard").

1. Incriminating Evidence

Significant evidence points to Madrigal's guilt. First and foremost, Madrigal was identified by three separate eyewitnesses, including the victim, as the shooter. CalVCB recognizes that the federal court found these identifications to be "inconsistent and contradictory." For instance, Aguilera selected Madrigal's photograph from a photographic lineup that included Mendoza, but at trial he repudiated that identification. Carlos unequivocally identified Madrigal as the shooter from the same photographic lineup, plus a Ford gang book, and again at trial, but Carlos failed to identify Madrigal at an in-person lineup, and he described Madrigal's facial hair as a goatee or mustache. Salvador unequivocally identified Madrigal as the shooter at trial and correctly described the shooter's facial hair as a partial goatee, but Salvador was unsure if he had previously identified Madrigal and did not recall if the shooter wore a hat. Despite these inconsistencies and contradictions, the "doctrine of chances" diminishes the likelihood that all three eyewitnesses were mistaken.¹²⁵ Moreover, the reliability of Aguilera's identification is bolstered by his recognition of Madrigal from prior encounters at Baby's Liquors, which was a Ford hangout known by Madrigal.¹²⁶ Furthermore, Carlos and Salvador have never recanted their identification of Madrigal as the shooter. While the federal court characterized this evidence as "relatively weak," it is nevertheless more than adequate to support a guilty verdict.¹²⁷

Second, Madrigal's own admissions link him to Aguilera's shooting. Most notably, Madrigal wrote and signed an incriminating "declaration" in which he admitted that he had "lie[d] to implicate these other people."¹²⁸ Although Madrigal testified at the new trial hearing that he only incriminated

¹²⁵ 2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 302, p. 241 ("doctrine of chances" holds "similar results do not usually occur through abnormal causes; and the recurrence of a similar result ... tends ... to negative accident or inadvertence of self-defense or good faith or other innocent mental state").

¹²⁶ AR 536, 1184, 1557, 1889.

¹²⁷ See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 (upholding conviction so long as, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

¹²⁸ AR 507, 1867-1868, 1904-1905, 1923-1924 (discussing Defense Exhibit A). As previously noted, a copy of this declaration was not provided to CalVCB.

1 himself under duress, that assertion is refuted by Madrigal's continued willingness to testify at trial
2 despite being threatened. In addition, Madrigal admitted being present during a private conversation
3 with four Ford gang members in his sister's bathroom when "Porky" was named as their next
4 target.¹²⁹ Six days later, Aguilera was shot in front of Porky's home after having been spotted with
5 Porky minutes earlier. Finally, Madrigal's summary of his interactions with Mendoza indicates a close
6 friendship, at least when the shooting occurred.¹³⁰ Since Mendoza was found in possession of the
7 gun used to shoot Aguilera one year later and no eyewitness ever identified Mendoza as the shooter,
8 the most likely inference is that Madrigal passed this gun onto Mendoza after the shooting.¹³¹ Thus,
9 Madrigal's admissions connect him to Aguilera's attempted murder.

10 Third, Madrigal's codefendant Oliveras explicitly and unequivocally confirmed that Madrigal
11 shot Aguilera. Although no objection has been raised, CalVCB assumes that Oliveras' out-of-court
12 statements implicating only Madrigal would be inadmissible under the traditional rules of evidence.
13 Nevertheless, to the extent Oliveras' statements implicate himself as the accomplice to Madrigal's
14 attempted murder of Aguilera, they are relevant and may be reasonably relied upon in this informal
15 proceeding.¹³² Oliveras admitted driving past Porky's house with Madrigal when they spotted
16 Aguilera and Porky in front, and then Madrigal shot Aguilera. Oliveras also admitted that the gun
17 used in the shooting was likely obtained from Madrigal's sister's house because that was where "we"
18 stashed "shit." While it appears that Oliveras and Madrigal were both working just a few miles from
19 each other on the day of the shooting,¹³³ Oliveras denied that the shooting was planned in advance.
20 Oliveras explained that he happened to encounter Madrigal that afternoon when they both drove up
21 to the same hamburger stand, presumably the Ford hangout where Madrigal told police he last saw
22

23 ¹²⁹ AR 536.

24 ¹³⁰ AR 536-538, 1889-1893, 1909-1913.

25 ¹³¹As previously noted, gang members do not share details of their crimes with outsiders, but they do
26 pass guns to each other. (AR 1937; CalVCB Hearing (6/3/13) at 1:10:09-1:11:11.)

27 ¹³² Cal. Code Regs., tit. 2, § 641, subd. (c) (allowing consideration of all relevant evidence "if it is the
28 sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs").

¹³³ AR 320-321, 1123.

1 Oliveras.¹³⁴ Oliveras made these incriminating statements without immunity or any promise of
2 leniency. Accordingly, Oliveras' confession to being an accomplice to Madrigal's attempted murder of
3 Aguilera constitutes substantial evidence of Madrigal's guilt.

4 Fourth, Madrigal was identified as the shooter in a second shooting. As told by the detective,
5 at least two "confidential reliable informants" identified Madrigal as the shooter in a gang-related
6 assault that occurred in May 2000.¹³⁵ Four months later, Madrigal was identified as the shooter in
7 Aguilera's attempted murder in July 2000. No objection was raised to CalVCB's consideration of this
8 evidence of a prior bad act. Even assuming this prior bad act is inadmissible to show Madrigal's
9 predisposition to commit gang-related shootings, it is admissible to negate mistake or accident and to
10 show a common plan.¹³⁶ The fact that Madrigal was identified as the shooter in two separate
11 shootings reduces the likelihood of misidentification.¹³⁷ It is objectively improbable that Madrigal was
12 twice erroneously implicated in the same type of criminal conduct within a four-month period of
13 time.¹³⁸ Accordingly, counsel's dismissal of this second shooting as being simply "unrelated" to the
14 Aguilera shooting is not convincing.¹³⁹

15 Overall, this incriminating evidence weighs heavily against Madrigal's claim of innocence.
16 CalVCB acknowledges the binding determination by the federal court that the prosecution's evidence
17 before the jury was "relatively weak." Nonetheless, the evidence before CalVCB includes significantly
18 more information than presented at trial. Considering all of the evidence in the administrative record,
19 along with the "relatively weak" eyewitness identifications from Aguilera, Carlos, and Salvador,
20 CalVCB finds compelling evidence of Madrigal's guilt.

21
22 ¹³⁴ AR 594, 1543, 2294.

23 ¹³⁵ AR 1442-1444, 1449, 1453.

24 ¹³⁶ Evid. Code, § 1101, subd. (b).

25 ¹³⁷ Wigmore, *supra*, § 302, p. 241 (describing "doctrine of chances").

26 ¹³⁸ See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1379-1380 ("doctrine of chances" requires
27 considerations of "the objective improbability of a coincidence in assessing the plausibility of a
28 defendant's claim that ... he or she was accidentally enmeshed in suspicious circumstances").

¹³⁹ CalVCB Hrg (7/10/17) at 27:30-32:55.

2. Madrigal Lacks Credibility

Moreover, Madrigal's version of events is not trustworthy, given the numerous inconsistent statements he has told over the years. Significantly, Madrigal testified, under oath, that he was – and was not – a gang member in 2000. At the new trial hearing, Madrigal unequivocally admitted that he was a Ford gang member in 2000.¹⁴⁰ But Madrigal subsequently asserted, in his post-conviction declaration and first CalVCB hearing, that he was *not* a Ford member in 2000.¹⁴¹ These contradictory sworn statements cannot all be true. One is a lie.

In addition, Madrigal has sworn that he is – and is not – innocent of Aguilera's attempted murder. As Madrigal testified at the new trial hearing, he wrote and signed an incriminating "declaration" which averred "his attorney made him lie to implicate these other people."¹⁴² This "declaration" was even signed by two attesting witnesses who were also Ford members.¹⁴³ But Madrigal has repeatedly testified in multiple forums that Mendoza committed the shooting with Oliveras.¹⁴⁴ Again, these contradictory sworn statements cannot all be true.

Madrigal also falsely testified in federal court that his attorney Stein never told him why he did not call him as a witness and that he "first" realized he was not going to testify at trial when closing arguments were underway.¹⁴⁵ A transcript of the trial proceedings refutes Madrigal's testimony. The day before closing arguments, Stein stated in Madrigal's presence, "*I intended to put him on the stand before I heard he was a suspect in another 245 shooting...*"¹⁴⁶ Thus, Madrigal was informed

¹⁴⁰ AR 1888-1889 ("And in the year 2000 were you a member of the Ford Maravilla Gang?" "Yes, I was.")

¹⁴¹ AR 2256-2257 ("little contact" with Ford members after 1994); CalVCB Hrg (06/03/13) at 53:33-54:10 (left the gang in 1995) 1:24:51-1:25:10 (left the gang in 1995), 1:28:27:53-1:28:39 (left the gang in 1995 and labeled snitch in 2001), 1:29:29-1:29:34 (no longer active member after 1995).

¹⁴² AR 507, 1868, 1888, 1904-1905, 1922-1924 (discussing Defense Ex. A).

¹⁴³ AR 1923.

¹⁴⁴ See generally AR 1902-1904, 1920, 2551; CalVCB Hrg (06/03/13) at 36:43-37:30,

¹⁴⁵ AR 406, 525-526.

¹⁴⁶ AR 1460 (emphasis added); see also AR 768 (minute order of 01/10/02 confirming Madrigal's presence).

1 by Stein, well in advance of closing arguments, that Stein no longer intended to call Madrigal to testify
2 after learning about Madrigal's arrest for a second shooting.

3 Although clear and convincing evidence proves Stein did explain his reason for declining to
4 call Madrigal as a witness before closing arguments, CalVCB is nevertheless bound by the federal
5 court's credibility determination that "[Madrigal's] testimony regarding this issue is more credible than
6 Stein's."¹⁴⁷ Accordingly, CalVCB must assume, pursuant to Penal Code sections 1485.5 and 4903,
7 that Madrigal honestly testified at the federal evidentiary hearing concerning his failure to testify at
8 trial. Consequently, CalVCB does not rely upon this particular instance of Madrigal's proven
9 untruthfulness when evaluating Madrigal's overall credibility.

10 Other instances of Madrigal's inconsistent statements amply confirm his untrustworthiness. In
11 his 2006 declaration, Madrigal averred that he drove Victor to and from work on July 5, 2000, "as
12 usual," because Victor "had no other means of transportation...."¹⁴⁸ But at the CalVCB hearing,
13 Madrigal testified that Victor's girlfriend commonly drove Victor to work in the mornings and he only
14 drove Victor home in the afternoon.¹⁴⁹ Madrigal also repeatedly testified that he no longer associated
15 with Ford members in 2000 and would only happen to encounter them when visiting his sister.¹⁵⁰
16 However, Madrigal's letter from 2003 admitted to interacting with Ford members on five separate
17 occasions during a two-month period in 2000.¹⁵¹ These interactions included a private discussion
18 among select Ford members, inside his sister's bathroom, during which Porky was suggested as the
19 next Marianna target.¹⁵² These interactions also included two encounters at places other than his
20 sister's house.¹⁵³ Moreover, Madrigal testified at the new trial hearing that Oliveras' confided he

22 ¹⁴⁷ AR 506-507; cf. 28 U.S.C. § 2254(e) (allowing federal court to reject state court's factual finding
23 when rebutted by clear and convincing evidence).

24 ¹⁴⁸ AR 2256.

25 ¹⁴⁹ CalVCB Hrg (06/03/13) 1:27:23-1:27:53.

26 ¹⁵⁰ AR 368-369, 2256; CalVCB Hrg (06/03/13) 1:28:19-1:29:04.

27 ¹⁵¹ AR 536-538.

28 ¹⁵² AR 536.

¹⁵³ AR 536-537.

1 could not get rid of the truck because he had borrowed it from his brother-in-law, yet Madrigal
2 “rejected” this testimony at the CalVCB hearing after testifying that gang members do not share
3 details of their crimes with anyone not involved in that crime, not even fellow gang members.¹⁵⁴

4 For all of these reasons, Madrigal lacks credibility in this CalVCB proceeding, even assuming
5 he truthfully testified in federal court about his failure to testify at trial. Accordingly, Madrigal’s
6 testimony asserting his innocence is simply not believable.

7 **3. Exculpatory Evidence**

8 By comparison, Madrigal’s exculpatory evidence is unpersuasive. This evidence includes an
9 alibi and third-party defense, as well as a polygraph report. As detailed below, this evidence fails to
10 show that Madrigal is more likely innocent than guilty of Aguilera’s attempted murder.

11 **a. Alibi Defense**

12 As for Madrigal’s alibi defense, which CIP counsel characterized as “rock solid,”¹⁵⁵ the federal
13 court only found Howards’ testimony to be “credible” and “certain.” Accordingly, CalVCB assumes
14 that Howards truthfully testified that he was “real certain” Madrigal remained at work until the end of
15 his shift. Howards based his belief upon the company’s procedures and policy, but not his own
16 eyewitness account. Under these circumstances, Howards’ sincere belief that Madrigal worked until
17 3:30 p.m. does not compel CalVCB to conclude that Madrigal actually was there.¹⁵⁶ In fact,
18 substantial evidence appears to the contrary.

19 Most obviously, Madrigal’s timecard for July 5, 2000, reflects that he “clocked” in that morning
20 at 7:25 a.m., “clocked” out for lunch at 11:30 a.m., “clocked” back in at 11:58 a.m., yet inexplicably
21 failed to “clock out” at the end of the day.¹⁵⁷ Just because these time entries erroneously appear in
22 the row for Monday, instead of Wednesday, still does not explain Madrigal’s failure to “clock out” at
23

24 ¹⁵⁴ AR 537-538, 1907-1908; CalVCB Hearing (06/03/13) at 1:01:48-1:08:22, 1:10:09-1:11:11.

25 ¹⁵⁵ CalVCB Hrg (6/3/13) at 5:53-5:58.

26 ¹⁵⁶ See *Madrigal, supra*, 6 Cal.App.5th at p. 1119 (recognizing federal court’s factual findings, including
27 Howards’ credibility determination, “fell short” of demonstrating actual innocence).

28 ¹⁵⁷ AR 667.

1 the end of the day. This omission is particularly suspicious considering that Madrigal's brother did
2 "clock out" at 3:30 p.m., supposedly while Madrigal was standing next to him.

3 Equally suspicious is Madrigal's production sheet for July 5, 2000, which confirms that
4 Madrigal did not operate the labeling machine after 1:20 p.m.¹⁵⁸ Although Madrigal testified at the
5 CalVCB hearing that he only stopped the machine in order to set up for an incoming "hot" order,
6 Victor testified at the federal evidentiary hearing that the machine actually "broke down" that
7 afternoon.¹⁵⁹ If the labeling machine broke down, then Madrigal's presence was no longer needed to
8 operate it. Regardless, the production sheet reveals that no task requiring Madrigal's specialized
9 training was performed after 1:20 p.m. that day.

10 Finally, Howards admitted in 2009 that Finley would know better than him whether Madrigal
11 worked until the end of his shift on July 5, 2000.¹⁶⁰ Finley previously testified at trial that Madrigal
12 could have left as early as 2:30 p.m. without him knowing.¹⁶¹ Thus, even Howards ultimately
13 admitted that Madrigal may have left work before 3:30 p.m.

14 Victor's alibi testimony is similarly unconvincing. Notably, the federal court only found Victor's
15 testimony to be "highly corroborative" of Madrigal's alibi and acknowledged Victor was "not a
16 disinterested witness."¹⁶² The federal court did not render any factual findings as to Victor's
17 credibility. Considering all of the evidence detailed above, CalVCB does not find Victor's version of
18 events to be believable, particularly in light of additional inconsistencies with his testimony. For
19 instance, Victor declared under oath that the labeling machine "ran smoothly that day," yet he testified
20 at the federal evidentiary hearing that the machine "broke down."¹⁶³ Also, Victor denied asking Finley
21 to correct Madrigal's timecard, yet Finley testified that Victor did.¹⁶⁴ In addition, Victor declared that

22
23 ¹⁵⁸ AR 1619-1625, 1630, 1664-1667.

24 ¹⁵⁹ CalVCB Hrg (06/03/13) 24:00-27:00; AR 456.

25 ¹⁶⁰ AR 540-541.

26 ¹⁶¹ AR 1662.

27 ¹⁶² AR 83.

28 ¹⁶³ Victor Declaration Supplement at p. 6; AR 456.

¹⁶⁴ Victor Declaration Supplement at p. 6; AR 553, 1654.

1 he “depended” on Madrigal to drive him to and from work every day, yet Madrigal admitted that
2 Victor’s girlfriend actually drove Victor to work in the mornings.¹⁶⁵ For all of these reasons, Victor’s
3 “highly corroborative” alibi testimony ultimately lacks credibility.

4 Overall, Madrigal has failed to prove by a preponderance that he was at work until 3:30 p.m.
5 when Aguilera was shot. Howards did not personally observe Madrigal at work at that time. Madrigal
6 did not clock out at the end of the day. Madrigal did not operate the specialized labeling machine
7 after 1:20 p.m. And Victor is not credible. Far from being “rock solid,” Madrigal’s alibi suffers from
8 significant holes.

9 **b. Third-Party Defense**

10 Madrigal’s third-party culpability defense is likewise unconvincing. The federal court found it
11 was “*apparent*” that Oliveras’ recorded conversation concerned an argument with Madrigal over his
12 inquiry into the Aguilera shooting, which provided “compelling” evidence of Madrigal’s “*apparent non-*
13 *involvement*” that was “highly reliable and exculpatory.”¹⁶⁶ The federal court’s repeated use of the
14 term “apparent” underscores the absence of any finding that the conversation was actually about the
15 Aguilera shooting or actually proved Madrigal’s innocence.¹⁶⁷ In fact, the federal court expressly
16 acknowledged that “the audiotape may not have completely demonstrated Petitioner’s factual
17 innocence....”¹⁶⁸ CIP counsel nevertheless characterized this recording as the “strongest” evidence
18 of Madrigal’s innocence.¹⁶⁹

19 In accordance with the federal court’s determinations, CalVCB assumes that Oliveras’
20 recorded conversation “appears” to exculpate Madrigal and that, had this “compelling” and “highly
21 reliable” recording been presented at trial, there is more than a reasonable probability the jury would

22
23 ¹⁶⁵ AR 552, 1654; Victor Declaration Supplement at p. 2; CalVCB Hrg (06/03/13) 1:27:23-1:27:53.

24 ¹⁶⁶ AR 58-60 (emphasis added).

25 ¹⁶⁷ See Merriam-Webster Online Dict. (2017) <<http://merriam-webster.com/dictionary> (as of September
26 20, 2017) (defining “apparent” as, inter alia, “manifest to the senses or mind as real or true on the basis
27 of evidence that may or may not be factually valid”).

28 ¹⁶⁸ AR 59.

¹⁶⁹ CalVCB Hrg (6/3/13) at 2:00:25-2:00:47; Oliveras Audio Recordings (tracks 1-8), received via email
on July 3, 2017.

1 have acquitted Madrigal. Nonetheless, CalVCB is not bound to assume that this “apparent”
2 exculpating evidence is actually true. To the contrary, the evidence before CalVCB strongly suggests
3 it is not.

4 Unbeknownst to the federal court, Oliveras’ recent interview provides substantial evidence
5 that the recording is not actually exculpating. According to Oliveras, his recorded conversation was
6 not about Aguilera’s attempted murder but, instead, about Porky’s shooting. The conversation was
7 recorded in August 2001, and Porky was shot just a few months earlier in May 2001.

8 Given this timing, it is more plausible that Madrigal was attempting to find out who had just
9 shot Porky, rather than who had shot Aguilera over a year ago. Indeed, it is highly unlikely that
10 Mendoza would have remained silent, for over a year, about shooting Aguilera, even while the two
11 were confined together in jail, after having rushed to tell Madrigal about shooting Romero and
12 Largo.¹⁷⁰ This unlikely scenario is even more improbable considering that Mendoza and Madrigal
13 were both present during the private bathroom conversation, wherein Porky was suggested as the
14 next target, and Aguilera was shot in front of Porky’s home just one week later. Ultimately, Madrigal’s
15 claim that he did not know who was responsible for Aguilera’s shooting in July 2000 until August 2001
16 is simply not believable.

17 Victor’s testimony on this issue is also not credible. In his declaration, Victor initially stated
18 that, “some months” after Madrigal’s arrest in July 2000, Madrigal asked him to find out who had
19 committed the shooting.¹⁷¹ But Victor subsequently testified at the evidentiary hearing that Madrigal
20 asked him to find out in spring 2001, almost one year after Madrigal’s arrest.¹⁷² Then, Victor
21 admitted to investigators that he learned the shooter’s identity only “a few weeks after” the shooting
22 occurred.¹⁷³ Thus, Victor has inconsistently claimed that he was asked to investigate Aguilera’s
23 shooting within mere weeks, a couple months, and almost a year of the crime. Moreover, Victor has
24

25 ¹⁷⁰ AR 536, 1889-1893, 1909-1912.

26 ¹⁷¹ Victor Declaration Supplement, at p. 8.

27 ¹⁷² AR 451.

28 ¹⁷³ AR 554.

1 repeatedly avoided accusing Mendoza outright, instead claiming he only heard that Mendoza was
2 “perhaps” the shooter.¹⁷⁴ Also, Victor has persistently refused to identify the person who told him
3 Mendoza was the culprit.¹⁷⁵ Finally, Victor claimed he told Madrigal about the results of his
4 investigation over the phone as soon as possible, but Madrigal claimed it was his wife who told him
5 after speaking to Victor.¹⁷⁶ Thus, Victor’s testimony is unconvincing.

6 But ultimately, Madrigal’s claim that the recording proves Mendoza’s guilt is fatally flawed. If
7 Mendoza was, in fact, the shooter, then why did Aguilera and Carlos both fail to select Mendoza’s
8 photograph from the photographic lineup? Because Aguilera and Carlos both chose Madrigal’s
9 photograph over Mendoza, Oliveras’ explanation of this recording appears most likely. In fact, Carlos
10 examined Mendoza’s photograph extensively at trial and confirmed that Madrigal was the shooter,
11 not Mendoza.¹⁷⁷

12 CIP counsel dismissed Oliveras’ explanation by noting that Madrigal and Oliveras were both
13 incarcerated when Porky was shot and, therefore, Madrigal had no reason to investigate Porky’s
14 shooting. However, Porky was a likely witness for the prosecution at their trial, and, therefore,
15 Oliveras and Madrigal both had a vested interest in Porky’s availability to testify against them.
16 Viewed in this light, the recording suggests that Oliveras at least knew who shot Porky, possibly even
17 planned it with Mendoza, and Oliveras feared that Madrigal would use this information to leverage a
18 deal for himself on Aguilera’s attempted murder.

19 Alternatively, even if Oliveras was referring to Aguilera’s shooting, the recorded conversation
20 still fails to demonstrate Madrigal’s innocence by a preponderance. Oliveras may have been
21 exaggerating or even lying to impress his girlfriend. It is also possible that the entire conversation
22 was staged in anticipation of future litigation, considering the foresight of Oliveras and Mendoza to
23

24
25 ¹⁷⁴ AR 460; Victor Declaration Supplement, at p. 8.

26 ¹⁷⁵ AR 556-556; Victor Declaration Supplement, at p. 8.

27 ¹⁷⁶ AR 521, 557-558; Victor Declaration Supplement, at p. 8.

28 ¹⁷⁷ AR 1359, 3863.

1 have Madrigal sign an incriminating “declaration” that Mendoza’s family produced at the new trial
2 hearing.

3 Lastly, CalVCB is mindful that the recording of Oliveras’ conversation was presented to the
4 California Supreme Court, and all seven justices unanimously affirmed Madrigal’s conviction and
5 sentence. Although the federal court determined that the California Supreme Court’s denial of
6 Madrigal’s claim of ineffective assistance of counsel on this basis was unreasonable, neither the
7 California Supreme Court, nor the federal court, has found this recording demonstrates Madrigal’s
8 innocence. Under these circumstances, CalVCB is hesitant to second-guess California’s highest
9 jurists.

10 In sum, the recording of Oliveras’ conversation fails to prove by a preponderance that
11 Madrigal is actually innocent of Aguilera’s shooting. This “strongest” evidence of Madrigal’s
12 innocence falls short.

13 **c. Polygraph Report**

14 Madrigal also offers a polygraph report in support of his innocence. This report, which was
15 written by a certified examiner in 2006, opines that “No Deception Indicated” when Madrigal denied
16 shooting Aguilera or being present when Aguilera was shot.¹⁷⁸ This report was first presented to the
17 California Supreme Court and then again to the federal court during habeas proceedings. However,
18 the examiner did not testify in either court. The federal court did not mention this polygraph report in
19 its decision granting habeas relief, although the magistrate judge did refer to it when granting bail.¹⁷⁹

20 Polygraph evidence is categorically inadmissible in a criminal trial under the traditional rules of
21 evidence.¹⁸⁰ As both the United States Supreme Court and California Supreme Court have
22 explained, “there is simply no consensus that polygraph evidence is reliable....”¹⁸¹ Studies on the
23 reliability of polygraph evidence “ran the gamut from showing an 87 percent accuracy rate to a rate

24 ¹⁷⁸ AR 2261-2262.

25 ¹⁷⁹ AR 106.

26 ¹⁸⁰ Evid. Code, § 351.1, subd. (a).

27 ¹⁸¹ *People v. Wilkinson* (2004) 33 Cal. 4th 821, 849 (quoting *United States v. Scheffer* (1998) 523 U.S.
28 303, 309).

1 'little better than could be obtained by the toss of a coin,' that is, 50 percent."¹⁸² Nonetheless, a
2 polygraph report may be admissible in a CalVCB proceeding "if it is the sort of evidence on which
3 persons are accustomed to rely in the conduct of serious affairs."¹⁸³

4 After due consideration, Madrigal's polygraph report is ultimately unpersuasive. Since the
5 examiner did not testify in state or federal court or before CalVCB, no foundation has been laid to
6 establish the authenticity and reliability of the polygraph report. Moreover, the report's conclusion
7 that Madrigal did not shoot Aguilera is contradicted by Madrigal's own incriminating statements in his
8 "declaration" for Mendoza.¹⁸⁴ CalVCB is also mindful that the California Supreme Court unanimously
9 rejected this report when denying Madrigal's habeas petition, and the federal court did not give any
10 consideration to this report when granting Madrigal's habeas petition. Compared to the significant
11 evidence of Madrigal's guilt, this report fails to prove Madrigal's innocence by a preponderance, even
12 when considered with Madrigal's other exculpatory evidence.

13 **d. Prosecution's Failure to Retry**

14 Madrigal also cites the prosecution's failure to retry him as proof of innocence. Neither party
15 has produced evidence that affirmatively explains the prosecution's failure to do so. It appears that
16 the Los Angeles District Attorney intended to retry Madrigal and conducted an extensive investigation
17 for that purpose. But on July 27, 2011, the Los Angeles County Superior Court dismissed the case
18 after the prosecution announced it was "unable to proceed."¹⁸⁵

19 An explanation for the prosecution's failure to proceed may be inferred from Oliveras'
20 interview. On February 11, 2011, Oliveras told law enforcement that he was willing to testify against
21 Madrigal in exchange for a release "date." Otherwise, if called to testify without a deal, Oliveras
22 "would just plea the 5th" to avoid "mess[ing] up any chances I might have on appeals first."¹⁸⁶ At the
23

24 ¹⁸² 2 Cal. Code Regs., § 641, subd. (c).

25 ¹⁸³ *Wilkinson, supra*, at p. 850.

26 ¹⁸⁴ AR 507, 1867-1868, 1904-1905, 1923-1924 (discussing Defense Ex. A).

27 ¹⁸⁵ AR 669.

28 ¹⁸⁶ AR 567.

1 time of this discussion, the magistrate judge had recommended denying Oliveras' federal habeas
2 petition on November 18, 2010, and Oliveras was waiting for the district court to decide whether to
3 adopt or reject the recommendation.¹⁸⁷ The district court ultimately adopted the recommendation on
4 September 7, 2011, one month after Madrigal's prosecution was dismissed.¹⁸⁸ The Ninth Circuit
5 affirmed the denial of habeas relief in December 12, 2014, leaving intact Oliveras' conviction and 25-
6 years-to-life sentence for Aguilera's attempted murder.¹⁸⁹

7 Considering this sequence of events, it appears that the prosecution's failure to retry Madrigal
8 was the result of Oliveras' unwillingness to testify without a deal before his federal litigation
9 concluded. In any event, no evidence suggests that the prosecution purposefully declined to retry
10 Madrigal due to any belief in his innocence. Under these circumstances, the prosecution's failure to
11 retry Madrigal does not bolster his claim of innocence.

12 **4. Weight of Evidence Fails To Prove Innocence**

13 After reviewing and considering the voluminous record in this matter, along with the federal
14 court's binding factual findings in support of the decision to grant habeas relief, it is determined that
15 Madrigal has failed to meet his burden to prove, by a preponderance of the evidence, that he did not
16 commit the crime with which he was charged and convicted. On balance, the weight of evidence
17 does not show that Madrigal is more likely innocent than guilty of attempting to murder Aguilera. In
18 fact, the evidence sharply tilts in the opposite direction.

19 To summarize, the incriminating evidence before CalVCB includes three separate eyewitness
20 identifications of Madrigal as the shooter, two of which have never been recanted. The incriminating
21 evidence also includes: Madrigal's own admissions linking him to the crime, Oliveras' confession to
22 their guilt, plus Madrigal's prior act of committing a gang-related shooting. While no physical
23 evidence ties Madrigal to the shooting, the weapon used to shoot Aguilera was found in Mendoza's
24 possession one year later, and Madrigal and Mendoza were both Ford members and close friends.

25
26 ¹⁸⁷ *Olivares v. Kirkland*, 2010 U.S. Dist. LEXIS 143683 (C.D. Cal., Nov. 18, 201).

27 ¹⁸⁸ *Olivares v. Kirkland*, 2011 U.S. Dist. LEXIS 101669 (C.D. Cal., Sept. 7, 2011).

28 ¹⁸⁹ *Olivares v. Soto*, 2014 U.S. App. LEXIS 23389 (9th Cir. Cal., Dec. 12, 2014).

1 Furthermore, Madrigal's contradictory statements, many of which were given under oath,
2 unequivocally demonstrate his untrustworthiness. By comparison, the credible testimony from
3 Howards, along with Madrigal's timecard and production log, nevertheless fail to confirm Madrigal's
4 presence at work when the shooting occurred. Similarly, the 2001 recording of Oliveras' conversation
5 fails to prove that Mendoza was the third-party culprit, especially considering Aguilera and Carlos's
6 selection of Madrigal's photograph over Mendoza's in the lineup, as well as Oliveras' recent
7 explanation that the conversation concerned Porky's shooting. Finally, the polygraph report and the
8 prosecution's failure to retry Madrigal are similarly unconvincing evidence of Madrigal's innocence.
9 Overall, this evidence fails to satisfy Madrigal's burden of proof and strongly suggests he is guilty.

10 This determination is entirely consistent with the federal court's decision that Madrigal's
11 criminal conviction was constitutionally infirm due to counsel's ineffective representation at trial. The
12 federal court only determined that, if counsel had presented the omitted evidence at trial, there is a
13 reasonable probability that the jury would not have found Madrigal guilty. A finding of not-guilty is not
14 at all equivalent to an affirmative finding of innocence. Moreover, the federal court's evaluation of the
15 jury's likely verdict was based upon much less evidence than presented to CalVCB. Accordingly, no
16 inconsistency appears.

17 **D. CalVCB Proceeding Satisfies Due Process**

18 In closing, a response is warranted to CIP counsel's challenge to the fairness of CalVCB
19 proceedings. According to counsel, CalVCB proceedings are unfair because of the frequency with
20 which CalVCB sides with the AG's recommendation, as well as the AG's purported conflict-of-interest
21 when appearing before CalVCB after having litigated against the claimant during the habeas
22 proceedings.¹⁹⁰

23
24
25
26
27
28

¹⁹⁰ CalVCB Hrg (06/03/13) at 4:14-4:27, 2:30:50-2:32:45, 2:36:05-2:38:21.

1 Madrigal is guaranteed a fair hearing as a matter of procedural due process.¹⁹¹ To be fair,
2 CalVCB must be impartial, but the parties need not.¹⁹² By statute, the AG is authorized to respond to
3 Madrigal's claim for compensation and to present evidence against it.¹⁹³ As with criminal trials,
4 CalVCB's adversarial system ensures that "the parties contest all issues" and "develop all relevant
5 facts" so that a just result may be reached.¹⁹⁴ Thus, the AG is not barred from appearing before
6 CalVCB simply because the AG previously sought to uphold the claimant's conviction during habeas
7 proceedings. So long as CalVCB's final decision rests upon the evidence before it, after giving equal
8 consideration to both parties' positions, no further process is due.

9 This standard has been met in Madrigal's case. As detailed throughout this Proposed
10 Decision, all of the evidence presented to CalVCB, both in support of and in opposition to Madrigal's
11 application for compensation, has been carefully considered. Moreover, both parties' contentions as
12 to the law and facts were equally considered before reaching a final conclusion. Ultimately, a
13 thorough examination of the evidence, combined with the federal court's binding factual findings,
14 compel the recommendation to deny Madrigal's application for compensation. Accordingly, this
15 denial satisfies due process, regardless of whether it happens to agree with the AG's response.
16 Madrigal's invocation of statistics from other CalVCB decisions that also sided with the AG's response
17 fails to demonstrate any bias in this proceeding.¹⁹⁵

21 ¹⁹¹ *Mathews v. Eldridge* (1976) 424 U.S. 319, 348-349; Pen. Code, § 4902, subd. (b); Cal. Code Regs.,
22 tit. 2, § 642, subd. (c).

23 ¹⁹² *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025; Cal. Code Regs., tit. 2, § 615.12,
24 subd. (a)(1)-(4) (compelling disqualification for any CalVCB board member or hearing officer who
25 "cannot provide a fair and impartial hearing; has bias; has prejudice; or has personal or financial
26 interest in the outcome of the hearing").

27 ¹⁹³ Pen. Code, §§ 4902, subd. (a), 4903, subd. (a).

28 ¹⁹⁴ *United States v. Nixon* (1974) 418 U.S. 683, 709.

¹⁹⁵ See *People v. Farley* (2009) 46 Cal.4th 1053, 1110 ("court's numerous rulings against a party –
even when erroneous – do not establish a charge of judicial bias, especially when they are subject to
review").

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

V.

CONCLUSION

In sum, Madrigal's claim for compensation is hereby recommended for denial. He has failed to demonstrate by a preponderance of evidence that he is actually innocent of the crime with which he was charged and convicted. Consequently, he is not eligible for compensation under Penal Code section 4900.¹⁹⁶

Date: November 17, 2017

Laura Simpton
Hearing Officer
California Victim Compensation Board

¹⁹⁶ If this Board decides to reject the Proposed Decision, then Madrigal is entitled to \$471,240 under the current statutes for serving 3,366 days imprisonment at a daily rate of \$140, or, alternatively, \$281,900 under the former statutes for 2,819 days post-conviction at a daily rate of \$100. Both calculations include partial days of confinement.

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

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

In the Matter of the Claim of:

Rafael Madrigal

PC 4900 Claim No. 11-ECO-01

Notice of Post-*Madrigal* Decision

On January 18, 2018, the California Victim Compensation Board voted 2-1 to adopt the attached Hearing Officer's Proposed Decision Post-*Madrigal* as its Decision in the above-referenced matter.

Date: January 26, 2018

Tisha Heard
Board Liaison
California Victim Compensation Board