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

10 In the Matter of the Claim of:

11 **Dwayne McKinney**

12 Claim No.: **G507450**

Proposed Decision

(Penal Code §§ 4900 *et seq.*)

13
14 A hearing on this claim was held January 30 through February 1, 2007, in Sacramento,
15 California, by Kyle Hedum, the Hearing Officer assigned to hear this matter by the Executive
16 Officer of the Victim Compensation and Government Claims Board (Board).

17 Attorneys Jeffrey M. Rawitz, Rasha Gerges, and Thane Vallette represented the
18 claimant, Dwayne McKinney (McKinney). In addition to receiving McKinney's testimony at the
19 hearing, the Board also heard testimony from Doctor Shomer and District Attorney Rackauckas.

20 Deputy Attorney's General Raymond Brosterhous and Michael Farrell represented the
21 California Department of Justice, Office of the Attorney General (AG). The AG has
22 recommended that McKinney's claim be denied.

23 **Background**

24 On the evening of December 11, 1980, five Burger King employees were closing a
25 Burger King restaurant (Burger King) located in Orange, California. Walter Bell (Bell) was the
26 restaurant manager, and Richard Shewbert (Shewbert) and Brian March (March) were working
27 the closing shift. Tim Smith (Smith) and Don Bulla (Bulla) were off-duty Burger King employees
who came into the restaurant to help their friends. Just after closing time, an African-American

1 male suspect entered the Burger King through a front door that failed to lock. Smith greeted the
2 suspect at the counter, and the suspect asked for a sandwich. Smith explained that the
3 restaurant was closed, but he offered the suspect a free drink. The suspect asked for a Dr.
4 Pepper. As Smith turned his back to the counter to get the drink, the suspect jumped or slid
5 over the counter. Once on the employee's side of the counter, the suspect pulled a pistol from
6 his waistband and put it to the back of Smith's head. The suspect escorted Smith to the kitchen
7 area of the restaurant and then waved the gun at Shewbert and March and ordered them into
8 the walk-in cooler where Bulla was standing. After putting Shewbert, March, and Bulla into the
9 walk-in cooler, the suspect took Smith to the manager's office where Bell was sitting at his desk.
10 The suspect told Smith to lie face down on the floor and ordered Bell to open the office safe and
11 then place his head down on the desk. After the suspect collected the money from the safe, the
12 suspect shot Bell once in the back of the head, killing him.

13
14 Detective Webb of the Orange Police Department investigated the Burger King robbery
15 and murder. Detective Webb interviewed Shewbert, March, Smith, and Bulla the evening of
16 December 11, 1980, and had them look through approximately 150 photos in various mug
17 books. The four Burger King employees did not identify the suspect from the mug books. The
18 employees worked with police sketch artists and made two composite drawings of the suspect.

19 A Los Angeles detective subsequently called Detective Webb and told him that the
20 physical description of the suspect in the Burger King crimes matched that of McKinney. On
21 December 17, 1980, Detective Webb went to Burger King and presented a photo lineup¹
22 consisting of 14 Polaroid photos, one of which depicted McKinney, to Shewbert and March.

23 March looked at the photos and told Detective Webb that he felt confused and stated
24 that McKinney's photo and the photo of another man in the photo lineup were similar to the
25 suspect, but because he could not be sure, he was not able to make an identification.

26
27 ¹ A photo lineup is an identification procedure in which an array of photographs, including a photograph of the person
28 suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense,
is displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as
the perpetrator.

1 Shewbert looked at all the photos and appeared to focus on McKinney's photo for about
2 ninety seconds before he told Detective Webb that he was sure that McKinney was the
3 murderer. He added that he would like to see McKinney in a live lineup.

4 Based on Shewbert's identification, Detective Webb obtained a warrant for McKinney's
5 arrest. On December 18, 1980, Officer Mendez from the Ontario Police Department arrested
6 McKinney following a traffic stop. Officer Mendez's report indicates that he saw McKinney
7 walking without crutches and with a slight limp prior to effectuating the arrest. At the Ontario
8 police station, McKinney complained that his leg hurt and McKinney told Officer Mendez that his
9 leg hurt and that he was unable to walk. Officer Mendez assisted McKinney from the police car
10 to the police station by holding McKinney's arm.

11 On December 18, 1980, the same day McKinney was arrested, Detective Webb
12 arranged for a live lineup² at the Orange County Jail. Smith, Shewbert, and Bulla attended the
13 live lineup. The men were told that a suspect had been arrested. Shewbert and Bulla both
14 identified McKinney as the person responsible for the Burger King robbery and murder. Smith
15 was not able to make an identification, although he did comment that McKinney looked like the
16 suspect. Detective Webb subsequently learned that McKinney had been wounded in the right
17 leg as a result of a drive-by shooting that took place on November 14, 1980, about a month prior
18 to the Burger King crimes.

19 McKinney was charged with the Burger King crimes, and on January 12, 1982, he was
20 convicted of first degree murder, robbery, assault with a deadly weapon, and burglary. The jury
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23 ² A live lineup is an identification procedure in which a group of persons, including the person suspected as the
24 perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the
purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.

25 ³ Penal Code section 190.2 contains a list of twenty-two types of first degree murder that qualify as special
26 circumstances, such as murder for hire, murder by use of poison, and murder in the commission of a robbery. In
27 California, a person found guilty of murder in the first degree can be punished by death, or by imprisonment in state
prison for life without the possibility of parole, when the jury also finds that the murder was committed with special
28 circumstances. If special circumstances are not present, the defendant can be committed to state prison for a term of
25 years to life.

1 also returned with a special circumstances³ finding. McKinney was sentenced to life in prison
2 without the possibility of parole.
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4 McKinney was subsequently granted a new trial on the sole issue of whether Bell's
5 murder was committed with the requisite intent to support a finding of special circumstances.
6 However, the trial court allowed McKinney to present evidence that he was not the person
7 responsible for the Burger King crimes. At the conclusion of the second trial, the jury was
8 instructed that because McKinney had previously been convicted for the Burger King crimes,
9 the jury's only task was to determine McKinney's state of mind at the time he murdered Bell.
10 The jury returned with a finding of special circumstances. On March 23, 1987, McKinney was
11 once again sentenced to life in prison without the possibility of parole.

12 On September 8, 1999, McKinney's attorney filed a Petition for Habeas Corpus.
13 Following an investigation by the Orange County District Attorney, the District Attorney decided
14 not to oppose the habeas petition, and McKinney was released from custody on January 28,
15 2000.

16 McKinney filed a timely claim with the Board on July 26, 2000, alleging that he should
17 receive compensation for the time he was erroneously confined in state prison. Following a
18 lengthy investigation, McKinney's claim was heard before a Board Hearing Officer on January
19 30 through February 1, 2007.

20 **Testimony and Evidence Presented**

21 The following discussion includes testimony and evidence from McKinney's criminal
22 trials, request for new trial, habeas petition proceeding, civil lawsuit discovery, and from the
23 Board hearing.

24 **.22 Caliber Bullets**

25 At McKinney's criminal trials, the prosecution presented evidence of the discovery of
26 three .22 caliber bullets at McKinney's residence; the same caliber of bullet that killed Bell.
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1 Two of the .22 caliber bullets were birdshot and the third was a hollow-point.⁴ It was determined
2 at trial that the bullet that killed Bell was a solid lead bullet and not of the type of .22 caliber
3 bullets located at McKinney's residence.

4 **Gang Membership**

5 At McKinney's criminal trials, the prosecution presented evidence that McKinney was a
6 member of the 52nd Street Crips gang at the time of the Burger King crimes and that the Burger
7 King robbery was similar to other robberies committed by the Crips. No other evidence was
8 presented that the Burger King crimes were gang-related.

9 **Vehicle Purchase**

10 At McKinney's criminal trials, the prosecution presented evidence that McKinney
11 purchased a vehicle from Robert Luna (Luna) for \$565 within days of the Burger King crimes, in
12 spite of being unemployed and having no income other than from the Social Security
13 Administration. Luna testified that he did not notice McKinney using crutches when McKinney
14 came to his home on the 15th or 16th of December. However, Luna testified that he did notice
15 McKinney was walking with a slight limp as he walked away from Luna's home after telling Luna
16 he would return to purchase the vehicle. Evidence was presented that McKinney lived a short
17 distance away from Luna.

18 **Doctor Barnett**

19 At McKinney's second criminal trial, Doctor Barnett offered testimony that McKinney
20 would have suffered significant physical limitations as a result of being shot with a shotgun on
21 November 14, 1980. Doctor Barnett, who did not treat McKinney, based his testimony on a
22 review of McKinney's medical records. Dr. Barnett opined that "it is very improbable that
23 McKinney could have vaulted a waist-high counter" on December 11, 1980. Doctor Barnett
24 also was of the opinion that McKinney would have exhibited a limp on the date of the Burger
25 King crimes.

26 **Doctor Diorio**

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28 ⁴ .22 caliber ammunition is manufactured in many versions. The "solid or standard" is a solid lead bullet, while the "hollow-point" is a lead bullet designed to expand upon contact with a target. "Birdshot" has, instead of a lead bullet, a projectile that contains multiple small pellets, similar to a shotgun shell.

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2 At McKinney's second criminal trial, McKinney's treating physician, Dr. Diorio, testified
3 that he examined McKinney on December 12, 1980, and that McKinney was not utilizing
4 crutches during this visit. Dr. Diorio testified that McKinney could have walked without a limp
5 had he so desired. Dr. Diorio also testified that McKinney may have been physically able to
6 jump, slide over, or vault the Burger King counter as described by Burger King employees,
7 although the movement might have caused McKinney substantial pain.

8 Eyewitness Testimony

9 Shewbert, who identified McKinney in the photo and live lineups, testified at both
10 criminal trials that McKinney was the person responsible for robbing the Burger King and for
11 killing Bell. Shewbert described the suspect as being 6'0" to 6'2" tall with "white" features and a
12 "regular" nose. Shewbert observed the suspect for about 7 seconds. Shewbert remains
13 confident that McKinney was correctly identified.

14 Bulla, who identified McKinney in the live lineup but who did not participate in the photo
15 lineup, testified at both criminal trials that McKinney was the person responsible for robbing the
16 Burger King and for killing Bell. Bulla described the suspect as being 6'1" to 6'2" tall with "wide"
17 eyes. Bulla observed the suspect for about 10 to 20 seconds. Bulla subsequently recanted his
18 identification and now believes that a person named Raymond Jackett (Jackett) is responsible
19 for the Burger King crimes.

20 Smith, who did not view the photo lineup and who was not able to identify McKinney in
21 the live lineup, testified at both criminal trials that McKinney was the person responsible for
22 robbing the Burger King and for killing Bell. Smith described the suspect as being 6'2" to 6'3"
23 tall with "fine" features. Smith observed the suspect for about 30 to 60 seconds. Smith remains
24 confident that McKinney was correctly identified.

25 March, who was not able to identify McKinney in the photo lineup and who did not view
26 the live lineup, testified at the first trial that McKinney was the person responsible for robbing the
27 Burger King and for killing Bell. He did not testify in McKinney's second trial. March described
28 the suspect as being 6'1" to 6'2" tall with a "full face-mainly dark." March observed the suspect

1 for about 6 seconds. March has subsequently stated that he is not sure that McKinney was the
2 person responsible for the Burger King crimes.

3 Charles Hill

4 While incarcerated at the Orange County jail following his arrest for the Burger King
5 robbery and murder, sometime in 1982, McKinney met Charles Hill (Hill). Hill was in custody
6 pending trial for his part in a series of violent and brutal crimes involving robbery, kidnapping,
7 rape, and sodomy. McKinney and Hill were housed in adjacent pods or cells in the protective
8 custody portion of the Orange County jail. Hill was also a member of the Crips gang, albeit a
9 different faction of the Crips than McKinney's affiliation.

10 A week or two after meeting, Hill told McKinney that he knew McKinney was innocent of
11 the Burger King crimes. Hill said that Jackett and Willie Walker (Walker) were the actual
12 perpetrators. Hill told McKinney that he had been involved in the planning stages of the Burger
13 King robbery, but decided at the last minute not to participate. Hill also told McKinney that other
14 people knew this same information, including Walker's mother and step-father.

15 After McKinney gave this revelatory information to his attorney, McKinney's attorney
16 decided not to inform the jury of Hill's statement because the attorney determined that Hill was
17 not credible. According to McKinney's attorney, when McKinney was told that the jury would not
18 be informed of Hill's statement, due to Hill's lack of credibility, McKinney had very little reaction
19 other than to say "okay."

20 Hill was interviewed and deposed several times by multiple parties during the course of
21 the various proceedings. Hill provided a substantial amount of information about the Burger
22 King crimes, including the planning of the robbery, a description of the vehicle used, the
23 placement of the employees in the walk-in freezer, and the use of a small caliber pistol. Hill also
24 disclosed that he was not happy that Walker, who was his cousin and co-defendant in the crime
25 spree for which he was currently incarcerated,⁵ chose to enter a guilty plea rather than have a
26 jury decide his case. Hill also expressed concern that Walker would testify against him in his
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28 ⁵ Having been convicted of 45 felonies, consisting of robbery, burglary, kidnapping, rape, oral copulation, and
29 sodomy, Hill was sentenced to life with the possibility of parole.

1 trial. Hill testified that after he threatened to expose Walker's role in the Burger King crimes if
2 he testified against him, Walker subsequently refused to testify against Hill.
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4 In 1997, fifteen years after Hill first told McKinney that he had information that could
5 prove McKinney's innocence, Hill and McKinney met once again at Lancaster State Prison.
6 Although they were not cell-mates, McKinney and Hill would sometimes see each other across
7 the prison yard and would acknowledge each other with a wave or a shout. According to Hill,
8 sometime in 1997, he was standing outside McKinney's cell and he told McKinney that he was
9 now ready to get McKinney out of prison. Hill stated that God sent him a message and told him
10 that now was the time to set McKinney free. He asked McKinney what he needed to do, and
11 McKinney told him to put his statement in writing and get it notarized. Hill did as requested by
12 McKinney. Hill's statement is dated September 4, 1997. McKinney's counselor picked up the
13 notarized statement from Hill's counselor, and McKinney forwarded this statement to his public
14 defender five months later. Upon receiving the notarized statement, Orange County Public
15 Defender Carl Holmes assigned an investigator to interview the four eyewitnesses, inmates Hill
16 and Walker, and other witnesses. Mr. Holmes testified in a deposition on June 15, 2001, that
17 because Hill was not a credible witness, his statement could best be used to "leverage" or
18 "move"⁶ the eyewitnesses into changing their earlier testimony.

19 Although Hill claims that he expected nothing in return for providing his assistance to
20 McKinney, this claim is contradicted by his reaction to the question at a subsequent deposition
21 of whether McKinney had contacted or done anything for him following McKinney's release. Hill
22 first mentions that he is aware that McKinney has a profitable business in Hawaii and that
23 McKinney received millions of dollars as a result of a civil settlement. His subsequent statement
24 "I'm disappointed in him (McKinney) cause for me to do what I did for him," indicates that Hill did
25 expect something in return for his help in getting McKinney out of prison.

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Anthony Gutierrez

⁶ To leverage or move a witness implies the use of some type of evidence in a manner consistent with changing a witness' prior testimony. In this case, Hill's statement, though deemed not credible by McKinney's attorney, was used to attempt to convince two eyewitnesses that they were mistaken when they identified McKinney as the Burger King suspect.

1 Anthony Gutierrez (Gutierrez) told a defense investigator on July 22, 1982, that Walker
2 admitted to him a few days after the Burger King crimes that he was the person who drove the
3 car away from the Burger King and that Jackett was the person who robbed the store and killed
4 the manager.

5 On September 24, 1982, Gutierrez recanted this statement and told the same defense
6 investigator that he lied in order to support Hill's statement that McKinney was innocent of the
7 Burger King crimes. He told the investigator that all his information was obtained from Hill.

8 In a subsequent interview by the AG, Gutierrez changed his story once again, this time
9 re-affirming his personal knowledge of the Burger King crimes and thus re-affirming McKinney's
10 claim of innocence. Gutierrez told the AG that he lied earlier because he did not want to be
11 labeled a snitch, and that he was now telling the truth because his knowledge of the crimes has
12 bothered him for a long time.

13 Willie Walker

14 Walker was interviewed and deposed several times by multiple parties. Walker was
15 incarcerated as a result of pleading guilty to 42 felonies,⁷ and he was sentenced to life with the
16 possibility of parole. Although he plead guilty to these various offenses, he testified in a
17 deposition that "I didn't do none of that stuff in there" referring to the criminal charges, and that "I
18 was just a follower" referring to following co-defendant Hill.

19 Walker initially denied any knowledge of the Burger King crimes. Later, he admitted to a
20 happenstance meeting with Jackett at the Burger King immediately after the Burger King
21 crimes, after which he gave Jackett a ride to Jackett's home. However, Walker later disclosed
22 that he was involved in the planning of the robbery and that he drove Jackett to and from the
23 Burger King the night of December 11, 1980. Walker described his car as a blue, 1963
24 Chevrolet with grey primer spots.

25 Blue Car

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28 ⁷ Walker's criminal convictions consisted of robbery, burglary, kidnapping, rape, oral copulation, and sodomy.

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2 Andrew Deari (Dean), who worked near the Burger King, left work at 10:45 p.m. on the
3 date of the robbery and murder to buy a hamburger from the Burger King. As he walked to the
4 Burger King, he saw an older model Pontiac, dark blue with gray primer spots and no hub caps
5 drive down Anita Drive, a cul-de-sac near the Burger King, and turn around slowly at the dead
6 end and drive back up toward Chapman Avenue. Dean stated that the car had two occupants.
7 Dean also stated that the car drove so close to him that he had to move out of the way to avoid
8 being hit. Dean ate his meal at the Burger King and left shortly before closing.

9 **Doctor Shomer**

10 Dr. Shomer is an expert in the area of eyewitness identification. Dr. Shomer testified at
11 the Board hearing that eyewitness identifications are the least reliable form of evidence and that
12 eyewitness identifications are often influenced by factors such as race differential, the events of
13 the crime itself, and by improper police procedures. Due to these factors, Dr. Shomer assigned
14 little weight to the identifications by Smith, March, Shewbert, and Bulla. He also acknowledged
15 that March's statement, almost 20 years later, that he made a mistake and picked the wrong
16 man, is worthy of little weight.

17 Dr. Shomer explained that Detective Webb may have intentionally or inadvertently
18 tainted the photo lineup and live lineup identifications by using procedures that hinted at or
19 focused the witnesses on a particular suspect. Dr. Shomer testified that he believed the
20 Polaroid photograph of McKinney, one of 14 shown to Shewbert and March was unduly
21 suggestive because it appeared to him that McKinney's photograph was lighter in color and also
22 because McKinney's face appeared larger than that of the 13 other people. Dr. Shomer was
23 also critical of the live lineup procedure, where the witnesses were transported together to and
24 from the lineup, and posited that a better live lineup would be accomplished using volunteers as
25 suspects and conducting the lineup at a location other than a jail or correctional facility.

26 Doctor Shomer testified that he was aware that the public defender investigator
27 attempted to "leverage" or "move" the eyewitnesses prior testimony by the use of questionable
28 tactics, which included showing the witnesses Jackett's photo without any comparison photos

1 and by providing false information to lead the witnesses to believe they made the wrong choice
2 when they identified McKinney.
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4 In response to the question of whether people tend to look bigger than they are when
5 holding a loaded gun, thus offering an explanation for the witnesses description of a suspect
6 that stood taller than McKinney, Doctor Shomer responded "To some extent they do."
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8 **District Attorney Rackauckas**

9 Prior to becoming the elected district attorney of Orange County, District Attorney
10 Rackauckas was the deputy district attorney who prosecuted McKinney in the first trial. District
11 Attorney Rackauckas testified at the hearing that the decision about whether to oppose
12 McKinney's habeas corpus petition was his and his alone. District Attorney Rackauckas
13 testified at the Board hearing that he assigned two district attorney investigators to McKinney's
14 habeas proceeding. He also assigned senior deputy district attorney Lew Rosenblum as the
15 attorney in charge of the McKinney investigation. At the time, Mr. Rosenblum was in charge of
16 the Orange County District Attorney's Homicide Division.

17 Following the investigation, District Attorney Rackauckas was informed by the
18 investigators that it was their opinion that Hill and Walker were credible witnesses. The
19 investigators also told District Attorney Rackauckas they believed that McKinney did not commit
20 the Burger King crimes. District Attorney Rackauckas testified that based on the investigation
21 and recommendations, he decided not to oppose McKinney's habeas corpus petition. District
22 Attorney Rackauckas also testified at the Board hearing that he believed it was likely that
23 McKinney did not murder Bell.

24 The AG presented documentary evidence at the hearing that Mr. Rosenblum informed
25 District Attorney Rackauckas that, in his opinion, the evidence that was reviewed for the habeas
26 petition did not establish McKinney's innocence and in fact appeared to demonstrate
27 McKinney's guilt. However, Mr. Rosenblum recommended that McKinney's habeas petition not
28 be opposed because: 1) two witnesses had recanted their identification, 2) problems were
29 anticipated regarding the prosecution's burden of producing discovery, 3) the probable difficulty

1 in proving the case beyond a reasonable doubt, and 4) because McKinney had already served
2 seventeen years for the Burger King crimes.

3 **Dwayne McKinney**

4 McKinney testified at the Board hearing that he could not have performed the robbery as
5 described by the Burger King employees because he suffered physical limitations due to being
6 shot on November 14, 1980. McKinney testified at the hearing that he was shot in the right calf
7 and upper right leg. He was immediately hospitalized and he was released from the hospital on
8 November 26, 1980. Upon his release, McKinney was provided crutches and was directed to
9 return for several follow-up visits. He was also provided codeine for pain management.

10 McKinney testified that he was unable to ambulate without crutches for several weeks
11 after his arrest. Because his leg was severely injured in the shooting, he testified that he was
12 physically unable to jump or leap over the Burger King counter as described by the employees.
13 McKinney also testified that he was limping long after he was arrested for the murder, and that
14 none of the Burger King employees ever described the robber and murderer as having a limp.

15 McKinney testified that he was at his sister's house the evening of December 11, 1980,
16 recovering from the gunshot wound. As he was watching television, he became aware of a
17 disturbance in his sister's front yard. He testified that he used his crutches to go outside to
18 speak to the parties responsible for the disturbance. In two separate interviews, McKinney's
19 niece, Delores McGee, told a defense investigator that McKinney spent the evening of
20 December 11, 1980, lying on the couch with his leg propped up. She also told the investigator
21 that she went to bed sometime after 10:00 p.m. In a third interview by the same investigator,
22 she revised her earlier statements and told the investigator that she did not go to bed until after
23 11:00 p.m.

24 McKinney's sister, Brenda McKinney, told the defense investigator that McKinney slept
25 on her couch the night of December 11, 1980. She also told the investigator that McKinney
26 was still lying on the couch when she left her residence between 9:30 p.m. and 10:00 p.m. The
27 investigator acknowledged that he assisted Brenda McKinney's recollection of the evening by
28 discussing other events occurring during the same period of time.

1 McKinney also offered the testimony of several other witnesses who testified at one or
2 both of his criminal trials that he was home the evening of December 11, 1980. James
3 Hernandez (Hernandez) testified at McKinney's first trial that he was at McKinney's home on
4 December 11, 1980, the evening of the disturbance that occurred in the front yard. At
5 McKinney's second trial, Hernandez testified that he was not sure of the dates, and that the
6 public defender's investigator had helped him recall the date of December 11, 1980. Four other
7 witnesses who testified that McKinney was home the evening of December 11, 1980, later
8 disclosed that they also had been unsure of the exact date and that the public defender's
9 investigator had assisted them in recalling the date, and in two instances the public defender's
10 investigator actually provided the date in question.

11 McKinney denied ownership of the .22 caliber bullets and argued that the .22 caliber
12 bullets were actually found in a common area in the home of McKinney's sister, and that this
13 home was shared by McKinney and numerous other individuals. McKinney also argued that the
14 bullets did not match the type of .22 caliber bullet used in the murder.

15 At the hearing, McKinney described an altercation with an Orange County deputy sheriff
16 as "a confrontation that took place and we was just actually wrestling." During cross
17 examination McKinney was confronted with evidence of the seriousness of the confrontation
18 and he admitted that he "may" have punched the sheriff's deputy in the face and "may" have
19 attempted to throw the sheriff's deputy off the upper tier in the jail's cellblock.

20 McKinney also testified at the hearing that he was a member of the 52nd Street Crips and
21 that he had remained in a car parked outside a jewelry store as other members of the 52nd
22 Street Crips prepared to rob the store in 1997. McKinney subsequently admitted at the hearing
23 that he entered the store with the other gang members, utilized a stolen car during the
24 attempted robbery, and possessed live ammunition.

25 In response to questions about his gang membership, McKinney did not deny his
26 membership in the 52nd Street Crips. McKinney explained that not all Crips were violent. He
27 testified that some Crips were known to play basketball while other Crips spent time singing.

1 McKinney acknowledged that some Crips gang members, including himself, engaged in various
2 criminal activities, including vehicle theft, burglary, robbery, and other property crimes.

3
4 As for the purchase of the car shortly after the Burger King crimes, McKinney testified
5 that he borrowed a majority of the money for the car from his brother, a fellow 52nd Street Crip,
6 and that his brother might have obtained the money as a result of robbery. McKinney also
7 borrowed \$50.00 from his sister. McKinney testified that he did not use his crutches when he
8 walked the short distance from his house to look at and then return to buy the car from Luna on
9 December 15th or December 16th, 1980.

10 McKinney testified that after he was told by Hill in 1982 that Hill knew McKinney was
11 innocent of the Burger King crimes, McKinney forwarded this information to his attorney in the
12 public defender's office. McKinney testified that he did not recall if his attorney spoke to him
13 about Hill's information, and he testified that he did not take any steps to encourage Hill to
14 testify on his behalf, even though McKinney had just been convicted of first-degree murder with
15 special circumstances and was awaiting the sentencing portion of his case. McKinney testified
16 that he believed that Hill would do the right thing when he was ready, and that nothing
17 McKinney could do would force Hill to help him.

18 In regards to the notarized statement McKinney received from Hill while incarcerated in
19 Lancaster State Prison in 1997, McKinney testified that he did not have any physical contact
20 with Hill while they were at Lancaster State Prison other than to acknowledge each other's
21 presence. McKinney testified that he was working in a vestibule area of the prison when Hill
22 hollered to him and said that "he was going to help me" and "he had something for me" and to
23 "send someone over to get it." McKinney asked the assistant warden's secretary to pick up
24 Hill's "something," and a notarized letter was delivered shortly after. McKinney testified that he
25 did know what Hill had for him, and he also testified that he did not tell Hill to get the statement
26 notarized. McKinney forwarded the notarized letter to various agencies that assisted inmates in
27 obtaining release from prison. McKinney also sent a copy of the notarized statement to his
28 attorney in the public defender's office about five months after receiving it from Hill.

Findings

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2 A preponderance of the evidence supports the following findings:

- 3 1. McKinney was convicted of robbery, burglary, and first degree murder on
4 January 12, 1982.
- 5 2. McKinney was twice sentenced to life in prison without the possibility of parole for
6 those crimes.
- 7 3. McKinney was released from custody on January 8, 2000, pursuant to a writ of
8 habeas corpus.
- 9 4. McKinney was incarcerated for 6,570 days subsequent to conviction.
- 10 5. McKinney suffered a serious but not incapacitating leg injury on November 14,
11 1980.
- 12 6. McKinney's leg injury did not preclude him from jumping or sliding over the
13 Burger King counter as described by Burger King employees.
- 14 7. McKinney was not gainfully employed prior to or at the time of his arrest.
- 15 8. Charles Hill's testimony and statements regarding the Burger King crimes are
16 determined to be not credible.
- 17 9. Willie Walker's testimony and statements regarding the Burger King crimes are
18 determined to be not credible.
- 19 10. Anthony Gutierrez's statements regarding the Burger King crimes are determined
20 to be not credible.
- 21 11. James Hernandez's testimony at the criminal trials regarding McKinney's location
22 at the time of the Burger King crimes is determined to be not credible.
- 23 12. Delores McGee's testimony at the criminal trials regarding McKinney's location at
24 the time of the Burger King crimes is given minimal weight.
- 25 13. Brenda McKinney's testimony at the criminal trials regarding McKinney's location
26 at the time of the Burger King crimes is given minimal weight.
- 27 14. McKinney's testimony at the hearing is determined to be not credible.

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15. The public defender's investigator who attempted to leverage or move the eyewitnesses into changing their testimony engaged in questionable behavior or tactics.
 16. Smith's identification of McKinney as the person who committed the Burger King crimes is determined to be credible.
 17. Shewbert's identification of McKinney as the person who committed the Burger King crimes is determined to be credible.
 18. Bulla's identification of McKinney as the person who committed the Burger King crimes is determined to be credible.
 19. Bulla's recantation of his earlier identification of McKinney as the person who committed the Burger King crimes is determined to be not credible based on the questionable tactics of the public defender's investigator.

Determination of Issues

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Penal Code section 4903 establishes the requirements which must be satisfied in order to state a successful claim for an erroneously convicted felon. The claimant must prove:

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

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

The claimant has the heavy burden of proving his innocence by a preponderance of the evidence. (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation and Government Claims Board* (2000) 152 Cal. App. 4th 1164.) Preponderance

1 of the evidence means "evidence that has more convincing force than that opposed to it."
2 (*People v. Miller* (1916) 171 Cal. 649, 652.)

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4 In reaching its determination of the merits of the claim, the Board may consider the
5 following, but the following will not be deemed sufficient evidence to warrant the Board's
6 recommendation that the claimant be indemnified in the absence of substantial independent
7 corroborating evidence that the claimant is innocent of the crime charged: 1) claimant's mere
8 denial of commission of the crime for which he was convicted; 2) reversal of the judgment of
9 conviction on appeal; 3) acquittal of claimant on retrial; or 4) the failure of the prosecuting
10 authority to retry claimant for the crime. (Cal. Code Regs., tit. 2, § 641.)⁸

11 The Board may consider as substantive evidence the testimony of witnesses whom the
12 claimant had an opportunity to cross-examine, and evidence to which claimant had an
13 opportunity to object, admitted in prior proceedings relating to the claimant and the crime with
14 which he was charged. The Board may also consider any information that it deems relevant to
15 the issue before it. (Regs., § 641.)

16 Shewbert identified McKinney in the photo and live lineups and testified at both criminal
17 trials that McKinney was the person who committed the Burger King crimes. Shewbert was
18 subsequently approached by the public defender investigator Nineteen years later, who tried to
19 unsuccessfully convince Shewbert that he had mistakenly identified Mckinney. Shewbert also
20 testified in a deposition after McKinney's release from prison that McKinney was responsible for
21 the Burger King crimes.

22 Smith, who did not view the photo lineup and who was not able to identify McKinney in
23 the live lineup, testified at both criminal trials that McKinney was the person responsible for the
24 Burger King crimes. The public defender investigator also attempted to speak with Smith about
25 his identification of McKinney, but was unsuccessful because Smith refused to speak with him.
26 Smith remains confident that McKinney was correctly identified.

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⁸ All regulations citations are to the California Code of Regulations, title 2.

1 Bulla, who did not view the photo lineup, identified McKinney in the live lineup and
2 testified at both criminal trials that McKinney was the person who committed the Burger King
3 crimes. Smith was subsequently approached by the public defender investigator nineteen
4 years later and was successfully convinced that he had mistakenly identified Mckinney. The
5 record indicates that Bulla was shown a single photo of Jackett, which moved him to recant his
6 earlier identification of McKinney as the person who committed the Burger King crimes.

7 Dr. Barnett, the expert who testified that it was improbable that McKinney could jump
8 over the Burger King front counter due to his injuries, was contradicted by McKinney's treating
9 physician, Dr. Diorio. Dr. Diorio testified that nothing prevented McKinney from walking without
10 a limp and that McKinney may well have been able to jump or vault the Burger King counter, as
11 described by Burger King employees, although the movement might have caused McKinney
12 substantial pain. Therefore, it is determined that McKinney was physically capable of jumping
13 or sliding over the front counter of the Burger King.

14 In support of the contention that McKinney exhibited only a minor limp at or about the
15 time of the Burger King crimes, Luna testified that he noticed McKinney walking with a slight
16 limp as he walked away from Luna's home after telling him that he would return to purchase the
17 vehicle. Officer Mendez also noticed McKinney walking with a slight limp prior to arresting him
18 on December 18, 1980. However, once arrested, McKinney claimed to be unable to walk
19 without assistance, which brings into question the validity of his claimed incapacitation.

20 The eyewitnesses offered varying estimates of the suspect's height, ranging from six
21 feet to six feet three inches tall. McKinney stands five feet ten and one-half inches tall.
22 However, the eyewitnesses admittedly focused on the firearm held by the suspect. Therefore,
23 notwithstanding Dr. Shomer's belief that the eyewitness descriptions regarding the height of the
24 suspect should be considered accurate and therefore, proof that McKinney could not have been
25 the Burger King suspect, it is likely that the eyewitnesses were more focused on the weapon
26 than on the height of the person holding the weapon. This conclusion is supported by Doctor
27 Shomer's testimony that a person holding a weapon might appear to be larger than they really
28 are.

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2 The fact that .22 caliber bullets were located at McKinney's residence, which residence
3 was shared with other individuals, is important only in that a .22 caliber pistol was used to
4 murder Bell and that this pistol could have been used to fire the bullets that were discovered at
5 McKinney's residence.

6 McKinney's admitted membership in the Crips gang is troubling, in that the Crips were
7 known then and known today for being involved in violent crimes. However, since none of the
8 witnesses described the Burger King suspect as being a gang member, McKinney's
9 membership in the Crips gang is not dispositive on the issue of whether he was responsible for
10 the Burger King crimes.

11 McKinney argues that Walker has placed himself in jeopardy by admitting that he was
12 involved in the planning stages of the robbery and by driving Jackett from the scene of the
13 crime. Whether Walker may have an ulterior motive in admitting some responsibility for the
14 Burger King crimes will likely never be known. However, based on the nature of the crimes to
15 which Walker plead guilty and because he continues to deny responsibility for many of the
16 brutal crimes to which he pleaded guilty, it is determined that Walker's testimony regarding his
17 involvement in the Burger King crimes is not credible.

18 The fact that a blue car with gray primer spots seen in the vicinity of Burger King at or
19 about the time of the robbery and murder has no evidentiary value because McKinney did not
20 prove by a preponderance of the evidence that this vehicle had any involvement in the Burger
21 King crimes. Although Walker testified that he owned a blue, 1963 Chevrolet with gray primer,
22 his testimony has been determined to be not credible and thus does not support McKinney's
23 assertion that Walker was involved in the Burger King crimes.

24 McKinney's criminal defense attorney acknowledged that Hill's statement implicating
25 Jackett and Walker in the Burger King crimes was worthless by itself. However, the statement
26 did have a value when used to leverage or move the eyewitnesses. Despite being presented
27 with this leverage, two of the Burger King crime eyewitnesses steadfastly maintain that
28 McKinney is the person who entered the Burger King restaurant on December 11, 1980, pulled

1 a pistol from the area of his waist, forced the employees into the walk-in refrigerator, robbed the
2 restaurant, and murdered Bell.

3 McKinney's niece, Delores McGee, told a defense investigator that McKinney spent the
4 evening of December 11, 1980, lying on the couch with his leg propped up. McKinney's niece
5 twice told the defense investigator that she went to bed sometime after 10:00 p.m. In a third
6 interview, McKinney's niece now told the defense investigator that she did not go to bed until
7 after 11:00 p.m. In light of Delores McGee's probable bias as McKinney's niece and based on
8 her changing testimony, her testimony is given minimal weight.

9 McKinney's sister, Brenda McKinney, told the defense investigator that McKinney slept
10 on her couch the night of December 11, 1980. She also told the investigator that McKinney was
11 lying on the couch when she left the residence between 9:30 p.m. and 10:00 p.m. The
12 investigator noted that he had to assist McKinney's sister in her recollection of the evening. In
13 light of Brenda McKinney's probable bias as McKinney's sister and based on her inability to
14 recollect the events of December 11, 1980, without assistance from the defense investigator,
15 her testimony is given minimal weight.

16 Alibi witness Hernandez testified that the public defender investigator helped him recall
17 the date of the Burger King crimes. Four other alibi witnesses also disclosed that they had been
18 unsure of the exact date of the Burger King crimes and that the public defender's investigator
19 had assisted them, with two of the witnesses being informed of the date in question. Given the
20 actions of the public defender's investigator, the testimony of these various alibi witnesses is
21 viewed in a critical light and is given minimal weight.

22 The district attorney investigators reviewed a significant amount of material and
23 interviewed a large number of witnesses prior to recommending that District Attorney
24 Rackauckas not oppose McKinney's habeas petition. However, it is determined that the district
25 attorney investigators and District Attorney Rackauckas were not privy to all the information as
26 presented to the Board. The district attorney's investigation of McKinney's habeas petition took
27 place in 1998 or 1999. A number of depositions and interviews of Hill, Walker, McKinney, and
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1 other witnesses for purposes of a civil lawsuit and in preparation for the Board hearing occurred
2 after McKinney's release in 2000 and continued to 2006.

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4 Although the district attorney's investigators determined that Hill and Walker were
5 credible witnesses, such a finding is contradicted by the evidence presented at the Board
6 hearing. Hill and Walker committed in excess of 40 serious and violent felonies in a short period
7 of time. Hill and Walker raped and sodomized numerous women while the victim's husbands
8 and children were restrained in other parts of the victim's homes. Walker continues to profess
9 his innocence even after pleading guilty to over 40 felonies. Hill likewise maintains his
10 innocence after being found guilty by jury, although he does acknowledge that if he did commit
11 the crimes for which he is incarcerated, he did so because he was under the influence of illegal
12 drugs.

13 District Attorney Rackauckas testified at the hearing that he believed it was likely that
14 McKinney did not commit the Burger King crimes. District Attorney Rackauckas testified that he
15 formed this opinion after discussing McKinney's habeas petition with his investigators and Mr.
16 Rosenblum.

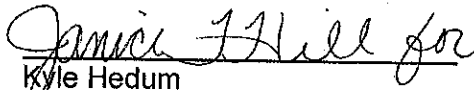
17 Mr. Rosenblum, the deputy district attorney in charge of McKinney's habeas petition
18 investigation, told District Attorney Rackauckas that in his opinion the evidence did not establish
19 McKinney's innocence and in fact appeared to demonstrate McKinney's guilt. However, Mr.
20 Rosenblum recommended that McKinney's habeas petition should not be opposed because: 1)
21 two witnesses had recanted their identification, 2) problems were anticipated regarding the
22 prosecution's burden of producing discovery, 3) the probable difficulty in proving the case
23 beyond a reasonable doubt, and 4) because McKinney had already served seventeen years for
24 the Burger King crimes.

25 Although District Attorney Rackauckas and Mr. Rosenblum are at odds over whether
26 McKinney was responsible for the Burger King crimes, it is determined that a preponderance of
27 the evidence favors Mr. Rosenblum's opinion that McKinney was responsible for the Burger
28 King crimes.

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2 Therefore, in consideration of all the evidence before the hearing officer, it is determined
3 that McKinney has not proven by a preponderance of the evidence that he did not violate
4 California Penal Code sections 187, 245, and 459 and that he did not, either intentionally or
5 negligently, contribute to his arrest or conviction for those offenses. The issue of whether
6 McKinney suffered pecuniary injury is therefore rendered moot.

7 McKinney's claim under Penal Code sections 4900 *et seq.* is denied.

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9 Date: September 7, 2007

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11 Kyle Hedum
12 Hearing Officer
13 Victim Compensation and
14 Government Claims Board
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