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8 **BEFORE THE VICTIM COMPENSATION BOARD**
9 **OF THE STATE OF CALIFORNIA**
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11 In the Matter of the Claim of:

12 **Juan Mermejo**

Proposed Decision

(Penal Code § 4900 et seq.)

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14 **Introduction**

15 Juan Mermejo's (Mermejo) claim for compensation as an erroneously convicted person was
16 submitted on the written record on July 28, 2016, in Sacramento, California.¹ Senior Attorney Mary
17 Lundeen was assigned to review the claim by the Executive Officer of the California Victim
18 Compensation Board. Mermejo was represented by Ken Karan, Esq. The California Department of
19 Justice, Office of the Attorney General (AG), was represented by Larenda Delaini, Esq.

20 Mermejo bears the burden of proving by a preponderance of the evidence he is innocent of
21 the crime of shooting at an occupied vehicle. Because there has been no finding of factual
22 innocence, and because he failed to offer evidence he did not shoot at the occupied vehicle, it is
23 determined that Mermejo has not proven by a preponderance of the evidence he is innocent of the
24 crime for which he was convicted. His claim for compensation is, therefore, recommended for denial.

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26 ¹ On August 5, 2016, despite the hearing officer's written notice that in-person testimony was likely
27 necessary in order for Mermejo to meet his statutory burden to prove he is entitled to the relief provided
28 by Penal Code section 4900 et seq., counsel for Mermejo reaffirmed his request the claim be decided
on the written record arguing resolution was a purely legal issue.

Procedural Background

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2 On December 19, 2005, the Los Angeles County District Attorney's Office charged
3 Mermejo with one count of shooting at an occupied vehicle² and two counts of assault with a firearm.³
4 Mermejo was also alleged to have personally used a firearm during commission of the charged
5 offenses subjecting him to a sentencing enhancement.⁴ Mermejo's trial concluded on March 28,
6 2006, with the jury deadlocked, and the trial court declared a mistrial. The People chose to retry, but
7 on August 14, 2006, before a second jury had been sworn, announced they were unable to proceed.
8 The trial court granted Mermejo's motion to dismiss but also granted the People's motion to reinstate
9 the three charges originally filed against him pursuant to Penal Code section 1387.2. Mermejo then
10 requested a third jury trial.

11 On October 31, 2006, after a negotiated disposition was reached, Mermejo pleaded no
12 contest to one count of shooting at an occupied vehicle and admitted to personally using a firearm
13 during commission of the crime. The People dismissed the remaining two felony counts as part of the
14 plea bargain. Mermejo was subsequently sentenced to an aggregate term of 17 years in state prison:
15 7 years for shooting at the occupied vehicle plus a consecutive 10 years for the firearm enhancement.
16 However, the trial court suspended the sentence, placed Mermejo on three years of formal probation,
17 and awarded him credit for 642 days already served.

18 On April 11, 2007, Mermejo was arrested for assault with a deadly weapon. After hearing,
19 the trial court found him in violation of probation and imposed his original 17 year sentence with credit
20 for 704 actual days/conduct credits.

21 On May 23, 2007, Mermejo timely appealed but only challenged the imposition of various
22 fines and fees. The Court of Appeal affirmed the judgment with modifications.

23 On October 31, 2014, the Department of Corrections and Rehabilitation noticed the trial
24 court that the firearm enhancement should not have attached to Mermejo's sentence because

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26 ² Penal Code section 246.

27 ³ Penal Code section 245(a)(2).

28 ⁴ Penal Code section 12022.5(a).

1 personal use of a firearm was an element of underlying charge of shooting into an occupied vehicle.
2 On June 1, 2015, the trial court agreed and resentenced Mermejo to seven years.⁵ He was released
3 from state prison on September 24, 2015.

4 **Mermejo's Arguments⁶**

5 Mermejo argues he is entitled to compensation pursuant to Penal Code section 4900, et
6 seq. because he did not commit a crime subject to a gun enhancement. However, Mermejo offered
7 no direct evidence he is innocent of the crime for which he was sentenced and convicted- shooting at
8 an occupied vehicle. When specifically asked by the hearing officer if his client violated Penal Code
9 section 246, Mermejo's counsel stated:

10 "A judicial record exists that addresses the issue. I cannot admit to anything beyond the
11 existence of that record, and that record is subject to interpretation. The fact that a jury heard
12 the testimony of the accusers and could not convict suggests innocence. The history of
13 criminal justice in this country reveals that many innocent defendants simply accept a plea
14 offer of some prison time to avoid greater consequences if a prosecutor succeeds at obtaining
15 a guilty verdict at trial."

16 Mermejo further argues the clear inapplicability of the sentencing enhancement renders his
17 guilt of the underlying crime legally irrelevant as evidenced by his statement, "... I do not believe
18 actual guilt is an issue in this matter since actual guilt of a section 246 violation can, by law, only
19 result in a maximum of prison term of seven years. The issue here is whether [he] is actually innocent
20 of a crime for which the use of a firearm provides an element that authorizes an enhancement. The
21 answer is yes, [he] is actually innocent of such a crime."

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26 ⁵ The AG contends the People were not notified of the legal error and resentencing as required by law.
27 If proper notice had been given, the People would have argued the plea bargain should have been
rescinded and either renegotiated, and/or the original charges reinstated.

28 ⁶ Only the arguments found relevant to this proceeding are summarized.

1 **AG's Position⁷**

2 The AG concedes Mermejo should not have received the 10-year sentence enhancement for
3 personal use of a firearm. However, the sentencing error does not negate the fact he pleaded no
4 contest to the underlying offense which was wholly supported by the evidence against him. Mermejo's
5 plea, in exchange for which two felony counts were dropped, establishes his guilt for the crime of
6 shooting at an occupied vehicle. Consequently, he is ineligible for compensation under Penal Code
7 section 4900, et seq.

8 **Determination of Issues**

9 Penal Code section 4903 establishes the requirements for a successful claim by individuals
10 alleging to have been imprisoned as a result of an erroneous conviction. In order to be successful on
11 such a claim, Mermejo must prove, by a preponderance of the evidence, that the crime with which he
12 was charged was either not committed at all, or, if committed, was not committed by him and that he
13 sustained injury as a result of his erroneous conviction and imprisonment.⁸ "Preponderance of the
14 evidence" means evidence that has more convincing force than that opposed to it.⁹

15 In reaching its determination of the merits of the claim, the Board may consider Mermejo's
16 mere denial of commission of the crime for which he was convicted, reversal of the judgment of
17 conviction on appeal, acquittal of Mermejo on retrial, or the failure of the prosecuting authority to retry
18 him for the crime. However, those factors will not be deemed sufficient evidence to warrant the
19 Board's recommendation Mermejo be indemnified in the absence of substantial independent
20 corroborating evidence he is innocent of the crime charged.¹⁰ The Board may also consider as
21 substantive evidence testimony of witnesses Mermejo had an opportunity to cross-examine, and
22 evidence to which Mermejo had an opportunity to object, admitted in prior proceedings relating to
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24 ⁷ Only the arguments found relevant to this proceeding are summarized.

25 ⁸ Pen. Code, § 4903; *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn. 7; *Tennison v.*
26 *Victim Compensation and Government Claims Board* (2006) 152 Cal. App. 4th 1164.

27 ⁹ *People v. Miller* (1916) 171 Cal. 649, 652.

28 ¹⁰ Cal. Code Regs., tit. 2, § 641.

1 Mermejo and the crime with which he was charged. Finally, the Board may also consider any
2 information that it may deem relevant to the issue before it.¹¹

3 The outcome of Mermejo's claim rests with the plain language of Penal Code section 4903.
4 Mermejo offered no evidence he was innocent of the crime to which he pleaded no contest and which
5 he did not appeal on the merits. The compensation he is seeking is available only if he proves the
6 crime with which he was charged was either not committed at all, or, if committed, was not committed
7 by him. Nothing in the record being considered herein proves by a preponderance Mermejo did not
8 shoot at an occupied vehicle. Therefore, although his argument he did not commit a crime subject to
9 a sentence enhancement is factually correct, it is determined to be legally irrelevant to his eligibility
10 for compensation under Penal Code section 4900 et seq.

11 Mermejo is not eligible for compensation as an erroneously convicted person. Thus, it is not
12 necessary to determine if he sustained injury as a result of his erroneous conviction and imprisonment.
13 Mermejo's claim for compensation is recommended for denial.

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16 Date: August 15, 2016

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Mary K. Lundeen
Hearing Officer
California Victim Compensation Board

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28 ¹¹ Cal. Code Regs., tit. 2, § 641.