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6 **BEFORE THE VICTIM COMPENSATION BOARD**
7 **OF THE STATE OF CALIFORNIA**
8

9 In the Matter of the Claim of:

10 **George E. Shull**

11 PC 4900 Claim No. 16-ECO-11

Proposed Decision

(Penal Code § 4900 et seq.)

12 **I.**

13 **INTRODUCTION**

14 On December 19, 2016, George E. Shull (Shull) filed his second application for compensation
15 as an erroneously convicted person, after his first was denied in 2010 as untimely. Shull's second
16 application included a declaration of factual innocence issued on October 11, 2016, for just two of
17 Shull's four convictions. A hearing ensued on May 26, 2017, attended by Shull in pro per and Deputy
18 Attorney General Barton Bowers on behalf of the California Attorney General (AG). Following the
19 parties' submission of supplemental briefs concerning Penal Code section 851.865,¹ the record
20 closed on June 29, 2017.

21 After considering all of the evidence and arguments from both parties, Shull's second
22 application is hereby recommended for denial. At the outset, CalVCB lacks jurisdiction to consider
23 the merits of Shull's second and untimely application. Alternatively, even if jurisdiction applies, Shull
24 is not entitled to automatic compensation under Penal Code section 851.865 because he only

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26 ¹ Penal Code section 851.865, subdivision (a), provides, "If a person has secured a declaration of
27 factual innocence from the court pursuant to Section 851.8 or 851.86, the finding shall be sufficient
28 grounds for payment of compensation for a claim made pursuant to Section 4900. Upon application by
the person, the California Victim Compensation Board shall, without a hearing, recommend to the
Legislature that an appropriation be made and the claim paid pursuant to Section 4904.

1 obtained a declaration of factual innocence for two of his four convictions. Finally, Shull is not entitled
2 to compensation under Penal Code section 4900 because he has failed to demonstrate that he
3 sustained the requisite injury as a result of his two erroneous convictions for which he served
4 concurrent terms on his valid convictions. Accordingly, Shull's second application as an erroneously
5 convicted offender is denied.

6 II.

7 BACKGROUND

8 A. Superior Court Proceedings for Nina T. and Mary D. Offenses

9 In 1998, Shull was charged in Santa Clara Superior Court with seven counts arising from two
10 separate incidents.² For the first "San Jose" incident involving victim Nina T.,³ Shull was accused of
11 attempted kidnapping (count 1),⁴ false imprisonment (count 2),⁵ assault (count 3),⁶ and misdemeanor
12 annoying or molesting a child (count 4).⁷ An enhancement for personally inflicting great bodily injury
13 upon Nina T. was further alleged for counts 1 through 3.⁸ For the second "Los Gatos" incident
14 involving victim Mary D., Shull was accused of assault (count 5),⁹ false imprisonment (count 6),¹⁰ and

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16 ² AG Ex. 1

17 ³ In order to protect her privacy, the victim's last name is omitted.

18 ⁴ Pen. Code, §§ 664/208.

19 ⁵ Pen. Code, §§ 236, 237.

20 ⁶ Former Pen. Code, § 245, subd. (a)(1) (West. 1998 ed.) ("Any person who commits an assault upon
21 the person of another with a deadly weapon or instrument other than a firearm or by any means of force
22 likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three,
or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand
dollars (\$ 10,000), or by both the fine and imprisonment."), repealed and replaced by Pen. Code, § 245,
subd. (a)(4), by 2011 Stats. 2011, ch. 15, § 298 (AB 109).

23 ⁷ Pen. Code, § 647.6.

24 ⁸ Former Pen. Code, § 12022.7, subd. (a) (West. 1998 ed.) ("Any person who personally inflicts great
25 bodily injury on any person other than an accomplice in the commission or attempted commission of a
26 felony shall, in addition and consecutive to the punishment prescribed for the felony or attempted felony
of which he or she has been convicted, be punished by an additional term of three years, unless
infliction of great bodily injury is an element of the offense of which he or she is convicted");
subsequently amended without significant change by Stats. 2010, ch. 711, § 5 (SB 1080).

27 ⁹ Former Pen. Code, § 245, subd. (a)(1) (West. 1998 ed.).

28 ¹⁰ Pen. Code, §§ 236, 237.

1 sexual battery (count 7).¹¹ An enhancement for personally using a deadly weapon (i.e., billy club)
2 was further alleged for counts 6 and 7.¹²

3 On November 8, 1989, Shull pleaded guilty to felony assault of Nina T. (count 3), with a great-
4 bodily injury enhancement, and misdemeanor molest of Nina T. (count 4). Shull also pleaded no-
5 contest to felony assault of Mary D. (count 5), with an enhancement for using a deadly weapon, and
6 felony sexual battery of Mary D. (count 7). At the hearing, Shull insisted he was “totally innocent” of
7 the Los Gatos incident involving Mary D., but he nevertheless entered a no-contest plea on the
8 advice of his counsel pursuant to *North Carolina v. Alford* (1970) 400 U.S. 25.¹³ In exchange, the
9 attempted kidnapping and false imprisonment charges as to Nina T. were dismissed (counts 1 and 2),
10 as well as the false imprisonment charge as to Mary D. (count 6). The indicated sentence for all four
11 convictions and two enhancements was an aggregate term of five years in state prison.¹⁴

12 The probation report summarized the facts underlying the San Jose incident involving Nina T.
13 as follows:

14 “On August 1, 1988, at approximately 8:00 p.m., 16-year-old victim, [Nina]
15 T., was assaulted by the defendant as she and her 15-year-old brother were
16 sitting at the bus-stop near Quito Road... in San Jose. [Nina] saw the defendant
17 approach... and immediately sit next to her on the bench. He [placed] his hand
18 on her bare leg ... and said, “Nice legs.” Alarmed, [Nina] T. [ran away] from the
19 defendant, who followed her and grabbed her arm and shoulder and began to
20 pull her in the direction of his vehicle. She estimates that he pulled her
21 approximately 25 to 30 feet. This action caused her to scream and struggle, at
22 which point the defendant placed his hand over her mouth. She was then thrown
23 to the cement ground with her face hitting the pavement. The defendant then
24 jogged away.

25 She was transported by ambulance to Los Gatos Community Hospital.
26 She sustained a severe abrasion to her upper lip, an abrasion to her right
27 shoulder, and bruises to both knees. Additionally, her right front tooth was
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11 Pen. Code, § 243.4.

12 Pen. Code, § 12022, subd. (b).

13 *Alford, supra*, 400 U.S. at p. 37 (upholding guilty plea as constitutionally valid despite defendant’s
14 protestation of actual innocence when entering plea).

14 AG Ex. 2 at pp. 1-21; AG Ex. 3 at p. 2.

1 chipped in half, the second tooth to the left was completely knocked out and the
2 third tooth, also on the left, was chipped.”¹⁵

3 As for the Los Gatos incident involving Mary D., the probation report stated that the “43-year-
4 old victim ... was sexually assaulted with a wooden billy club wielded by an unknown person” around
5 midnight on September 13, 1998. The assailant snuck into Mary D.’s home when she went outside to
6 turn off her backyard sprinklers. The assailant fled after the attack. Mary D. subsequently identified
7 Shull as her attacker from a photographic lineup.¹⁶

8 On December 8, 1989, the superior court sentenced Shull to an aggregate term of five years
9 imprisonment. The sentence was comprised of the following terms:

10 Count 3: low term of two years for assaulting Nina T. (former Pen. Code, § 245, subd.
11 (a)(1)), plus three years for the great-bodily injury enhancement (former Pen. Code, §
12 12022.7), for a total of five years;

13 Count 4: concurrent term of one year for misdemeanor molesting Nina T. (Pen. Code, §
14 647.6);

15 Count 5: concurrent low term of two years for assaulting Mary D. (former Pen. Code, §
16 245, subd. (a)(1)); and

17 Count 7: concurrent low term of two years for sexual battery of Mary D. (Pen. Code, §
18 243.4), plus a one-year weapon enhancement (Pen. Code, § 12022, subd. (b), for a total
19 concurrent term of three years.¹⁷

20 Thus, Shull was sentenced to a total term of five years solely for assaulting Nina T. (count 3). Shull
21 received a concurrent sentence of two years for assaulting Mary D. (count 5), and another concurrent
22 sentence of three years for the sexual battery of Mary D. (count 7). A restitution fine of just \$100 was
23 imposed.¹⁸

24 ¹⁵ AG Ex. 3 at pp. 2-3; see also Shull Reply Ex. 10 (preliminary hearing testimony of Nina T.).

25 ¹⁶ AG Ex. 3 at p. 4.

26 ¹⁷ Shull Ex. C; AG Ex. 4 at p. 7.

27 ¹⁸ Shull Ex. C. The probation report did not include any victim statements because Nina T.’s telephone
28 number was no longer working and Mary D. was rendered homeless by a recent earthquake. (AG Ex.
3 at p. 5.) The report noted, however, that Nina T. testified at the preliminary hearing that, as a result of
the attack, she had her teeth capped, which required multiple dental appointments.

1 When imposing sentence, the superior court “focus[ed]” on the charges involving Nina T. and
2 “accept[ed] for the moment” that Shull did not commit the charges involving Mary D.¹⁹ As to the San
3 Jose incident involving Nina T., the court chastised Shull,

4 “The fact of the matter is that you did hurt her. You hurt her badly. You terrorized her.
5 You affected her life permanently. She is never going to be the same person she was
6 before it happened.”²⁰

6 The court continued,

7 “When you assault a stranger in a sexual context, and overpower her and throw her to
8 the ground and cause disfigurement, ... you can’t begin to understand how shattering
9 that is to her.”²¹

9 The court recognized that mitigating factors were present, which included Shull’s honorable discharge
10 from the Army in 1981, recent graduation from San Francisco State University with a bachelor’s
11 degree in English, and no prior felony convictions.²² The court ultimately concluded, “*But I think this*
12 *is without a doubt, a case in which a state prison sentence is appropriate.*”²³

13 Shull did not seek appellate review of the judgment.²⁴ On June 15, 1992, after serving a total
14 of 946 days, Shull was released from prison on parole.²⁵ Shull’s parole terminated on July 25,
15 1994.²⁶ Thus, Shull ultimately served half of his aggregate five-year sentence.²⁷

16 **B. Trial Court Proceedings for Failing to Register as a Sex Offender**

17 For the next 13 years, Shull remained free from incarceration until November 12, 2002, when he
18 was arrested for failing to register as a sex offender.²⁸ Shull’s obligation to register was triggered by his

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20 ¹⁹ AG Ex. 4 at pp. 3-4.

21 ²⁰ AG Ex. 4 at p. 3.

22 ²¹ AG Ex. 3 at pp. 6-7; AG Ex. 4 at p. 5.

23 ²² AG Ex. 4, at p. 5.

24 ²³ AG Ex. 4 at p. 5 (emphasis added).

25 ²⁴ Hearing (5/26/2016) at 39:00-39:45.

26 ²⁵ AG Ex. 5; AG Supp. at p. 1 fn.2.

27 ²⁶ Shull Claim; AG Ex. 5 (CDCR log noting parole “discharge effective 7/25/94”); cf. Shull PD (08/18/10)
28 at p. 5 (CalVCB finding Shull’s parole terminated in 1995), located in AG Ex. 6 at p. 46.

²⁷ Shull Claim; Shull Ex. B.

²⁸ Shull Ex. I; Former Pen. Code, § 290, subd. (g)(2) (West 2001 ed.).

1 felony conviction for sexual battery of Mary D., as well as his misdemeanor conviction for molesting
2 Nina T.²⁹ However, failing to register is only punished as a misdemeanor if the underlying sexual
3 offense was also a misdemeanor.³⁰ Shull was charged with a felony, based upon his felony conviction
4 for sexual battery of Mary D.³¹ Shull faced an indeterminate life sentence under the Three Strikes law
5 as a result of his two “strike priors” for assaulting Mary D. and Nina T.³² Shull pleaded guilty to felony
6 failure to register on April 11, 2003, and in exchange the court suspended criminal proceedings and
7 placed Shull on probation for two years.³³

8 In 2010, Shull successfully moved to reduce and set aside this felony conviction for failing to
9 register as a sex offender, after his underlying sexual battery conviction was vacated.³⁴ Three years
10 later in 2013, Shull’s registration requirement was evidently terminated after obtaining a Certificate of
11 Rehabilitation.³⁵

12 **C. State Habeas Proceeding for Mary D. Offenses**

13 In 2009, the Northern California Innocence Project filed a habeas petition to vacate Shull’s
14 convictions for only counts 5 and 7 involving Mary D., leaving intact his convictions for counts 3 and 4
15 involving Nina T. The petition included an investigator’s declaration that Mary D. had recanted her
16 identification of Shull, and a polygraph examination attesting to Shull’s truthful claim of innocence.
17 Although Shull was no longer in custody, the District Attorney agreed to jurisdiction and further
18 agreed to the requested relief. On December 10, 2009, the court granted the writ and vacated counts
19 5 and 7 for the assault and sexual battery of Mary D.³⁶ The validity of Shull’s remaining convictions
20 for counts 3 and 4 involving Nina T. was not affected.

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22 ²⁹ Former Pen. Code, § 290, subd. (g)(2)(A) (West 2001 ed.); see also Pen. Code, § 290, subd. (c)
(imposing lifetime registration duty for sexual battery and molesting a child).

23 ³⁰ Former Pen. Code, § 290, subd. (g)(1) (West 2001 ed.).

24 ³¹ Shull Ex. I.

25 ³² Shull Ex. I.

26 ³³ Shull Ex. E.

27 ³⁴ Shull Ex. E.

28 ³⁵ AG Ex. 8.

³⁶ AG Ex. 6 at pp. 58-80.

1 **D. First CalVCB Application**

2 On June 7, 2010, Shull filed his first application for compensation as a wrongfully convicted
3 person seeking compensation for “half of [his] actual time served” (i.e., 460 days).³⁷ On September
4 16, 2010, CalVCB determined that the application was untimely filed and, therefore, lacked
5 jurisdiction to consider the merits.³⁸ Shull petitioned for a writ of mandate in the superior court, which
6 was denied on March 6, 2012.³⁹ The Court of Appeal, Sixth Appellate District, affirmed the superior
7 court’s denial on March 1, 2014.⁴⁰

8 **E. Finding of Factual Innocence for Mary D. Offenses**

9 On April 29, 2016, Shull petitioned the Santa Clara County Superior Court for a declaration
10 of factual innocence on counts 5 and 7 for the assault and sexual battery of Mary D. that occurred in
11 Los Gatos. The District Attorney invited the superior court to grant the petition. Accordingly, on
12 October 11, 2016, the superior court declared, pursuant to Penal Code section 851.8, that Shull “is
13 factually innocent of the charges for which he was arrested on October 28, 1988, as chronicled in Los
14 Gatos Police Report 88-4340.” The court further declared that Shull’s “judgment of conviction on
15 Counts 3 and 4 – the crimes associated with the San Jose Incident [involving Nina T.] – remains
16 undisturbed.”⁴¹

17 **F. Second CalVCB Application**

18 On December 19, 2016, Shull filed a second application as a wrongfully convicted person
19 and requested compensation for the full length of his incarceration (i.e., 946 days).⁴² Shull

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21 ³⁷ AG Ex. 6 at pp. 52-57.

22 ³⁸ Shull PD (08/18/2010) at pp. 1-6 (located in AG Ex. 6 at pp. 41-47).

23 ³⁹ AG Ex. 6 at pp. 1-29, 145-158.

24 ⁴⁰ AG Ex. 7.

25 ⁴¹ Shull Ex. A at p. 2.

26 ⁴² Shull initially claimed he served 920 days for his 1989 convictions, and then he sought to add 16
27 days for the time served for failing to register as a sex offender in 2002. (Shull Claim at pp. 1, 6; Shull
28 Supp. at p. 3.) Shull is barred from belatedly claiming compensation based upon his confinement for
an entirely different offense not listed in his original claim. Nevertheless, the AG confirmed that Shull’s
imprisonment for the 1989 convictions totaled 946 days, consisting of 26 days pre-sentencing and 920
days post-sentencing. (AG Supp. at p. 1 fn. 2.)

1 supplemented this application with additional attachments on January 13, 2017. The application
2 “acknowledge[d] his culpability” for counts 3 and 4 involving Nina T., but he insisted compensation
3 was mandated, pursuant to Penal Code section 851.865, by the superior court’s declaration of factual
4 innocence for counts 5 and 7 involving Mary D.⁴³

5 On January 17, 2017, CalVCB’s Senior Attorney Kyle Hedum notified Shull by email that the
6 AG was reviewing his application and had 60 days to respond. Shull questioned the AG’s
7 involvement given his declaration of factual innocence, again citing Penal Code section 851.865. By
8 email dated January 18, 2017, Senior Attorney Hedum explained that additional information was
9 needed from the AG before a determination could be made as to Shull’s eligibility for compensation.

10 On February 13, 2017, the AG submitted a response letter, along with 19 exhibits.
11 Significantly, the AG accepted Shull’s declaration of factual innocence for the assault and sexual
12 battery of Mary D. for counts 5 and 7. The AG nevertheless insisted that compensation was barred
13 because of Shull’s undisputed guilt for the felony assault and misdemeanor molest of Nina T. for
14 counts 3 and 4. The AG reasoned that Shull’s imprisonment on counts 5 and 7 for two and three
15 years, respectively, was not erroneous because “he was at the same time serving a concurrent
16 sentence of five years for” his convictions involving Nina T.⁴⁴ Consequently, the AG asserted that
17 Shull had failed to demonstrate any injury as a result of his wrongful convictions. Finally, the AG
18 summarized the legislative history behind recent changes to Penal Code sections 4900 and 4904 and
19 the enactment of Penal Code section 851.865 to conclude that the “Legislature intended to
20 compensate defendants who are fully exonerated, not persons imprisoned for valid convictions.”⁴⁵

21 On February 16, 2017, Senior Attorney Hedum notified both parties of his intent to schedule a
22 hearing in May 2017. After both parties responded, the hearing was scheduled for May 26, 2017.

23 On April 3, 2017, Shull submitted a reply to the AG’s response. Shull again invoked Penal
24 Code section 851.865 to support his claim for compensation. Shull also maintained that he suffered

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26 ⁴³ Shull Claim at pp. 3-4; Shull Ex. M.

27 ⁴⁴ AG Ltr at 1.

28 ⁴⁵ *Id.* at 9-12.

1 injury as a result of his erroneous convictions involving Mary D., which included harsher terms of
2 confinement while in prison, mandatory registration as a sex offender upon his release, and greater
3 difficulty obtaining employment. Shull further claimed that his remaining convictions involving Nina T.
4 were the result of overcharging and “piling on” the great-bodily injury enhancement.⁴⁶

5 The hearing occurred on May 26, 2017, before CalVCB Senior Attorney Laura Simpton. Both
6 parties presented opening statements and closing arguments. In addition, Shull testified on his own
7 behalf subject to cross-examination.⁴⁷ No other witnesses appeared.⁴⁸ Shull maintained that he was
8 innocent of the assault and sexual battery of Mary D. in counts 5 and 7. Shull acknowledged his guilt
9 for the assault of Nina T., although he disputed whether the great-bodily-injury enhancement was
10 valid as a matter of law because, as he understood, great-bodily-injury was an element of the
11 underlying assault.⁴⁹ Shull also submitted a copy of the current statute defining this enhancement.⁵⁰
12 Shull recounted the heightened restrictions he endured while in prison, as well as the additional
13 hardships he suffered following his release, as a result of these two erroneous convictions. Shull
14 reiterated that he sought compensation for all 946 days of his incarceration, but he would be willing to
15 accept less.⁵¹ The AG responded that Shull’s current application was barred by CalVCB’s denial of
16 his previous application and, assuming otherwise, Shull has failed to demonstrate any injury as a
17 result of his concurrent sentences.

18 Thereafter, both parties submitted supplemental briefs addressing the impact of Penal Code
19 section 851.865 upon Shull’s application. Shull maintained that section 851.865 negated any

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21 ⁴⁶ Shull Reply at 1-12.

22 ⁴⁷ Hearing (5/26/2017) at 28:19-44:54.

23 ⁴⁸ Shull noted that he had unsuccessfully attempted to contact former California State Senator Mark
24 Leno to request his appearance as a witness. (Hearing (5/26/2017) at 5:48-5:58.) Shull requested
25 CalVCB suspend its decision until Senator Leno’s input on this matter could be obtained. (Hearing
26 (5/26/2017) at 26:03-26:13.) No such input has been received. Accordingly, CalVCB declines to
27 indefinitely postpone its decision and, instead, issues this decision based upon the closed record and
28 current state of law.

⁴⁹ Hearing (5/26/2017) at 45:13-46:20.

⁵⁰ Shull Hearing Ex. 1.

⁵¹ Hearing (5/26/2017) at 46:22-48:02.

1 requirement that he prove injury and further compelled CalVCB to grant his application without
2 conducting a hearing. Alternatively, to the extent a showing of injury was statutorily required, Shull
3 maintained that his evidence amply satisfied it. Shull further suggested that CalVCB's statutory
4 obligation under Penal Code section 4902 to issue a recommendation within 30 days was "postponed
5 or put on hold" by the AG's legal challenge to his claim for compensation.⁵²

6 By comparison, the AG's post-hearing brief reiterated that Shull's current application was
7 barred as untimely. The AG further asserted that Penal Code section 851.865, when considered in
8 conjunction with Penal Code sections 4900 and 4904, requires proof of injury by a preponderance of
9 the evidence before any compensation may be recommended. While language in section 851.865
10 seemingly barred CalVCB from conducting a formal hearing, the AG insisted that procedural due
11 process nevertheless permitted an informal hearing, or at least the submission of evidence, on the
12 issue of injury. The AG alternatively recognized that section 851.865 created "a rebuttable
13 presumption that a claimant has established injury," but urged that such a presumption was contrary
14 to the Legislature's clearly expressed intent to compensate only those applicants who have suffered
15 injury. The AG conceded that, if applicable, section 851.865 triggered a 30-day deadline in Penal
16 Code section 4902 for CalVCB to resolve Shull's claim, but nevertheless noted that no explicit penalty
17 or consequence occurred for failing to comply. The AG finally concluded that CalVCB should
18 recommend payment of \$0 under section 851.865 because not even a single day of Shull's
19 imprisonment resulted from his erroneous convictions.⁵³

20 III.

21 DETERMINATION OF ISSUES

22 Penal Code section 4900 provides:

23 **"Any person who, having been convicted of any crime against the state**
24 **amounting to a felony and imprisoned** in the state prison or incarcerated in county jail
25 pursuant to subdivision (h) of Section 1170 for that conviction, is granted a pardon by the
26 Governor for the reason that the crime with which he or she was charged was either not
27 committed at all or, if committed, was not committed by him or her, or who, **being**

28 ⁵² Shull Supp. Brief.

⁵³ AG Supp. Brief.

1 **innocent of the crime with which he or she was charged** for either of the foregoing
2 reasons, shall have served the term or any part thereof for which he or she was
3 imprisoned in state prison or incarcerated in county jail, **may, under the conditions**
4 **provided under this chapter, present a claim** against the state to the California Victim
5 Compensation Board **for the pecuniary injury sustained by him or her through the**
6 **erroneous conviction and imprisonment or incarceration.**⁵⁴

7 Thus, section 4900 authorizes a single application for compensation to be filed by a person who has
8 been convicted, imprisoned, and served at least a portion of the term imposed for a felony conviction of
9 which he claims to be innocent.

10 Penal Code section 4901 imposes a two-year deadline for filing the application. Specifically,
11 section 4901 provides:

12 “A claim under Section 4900 is required to be presented by the claimant to the
13 California Victim Compensation Board **within a period of two years** after judgment of
14 acquittal or after pardon granted, or after release from custody, and no claim not so
15 presented shall be considered by the California Victim Compensation Board.”⁵⁵

16 The phrase “release from custody” includes release from prison or jail, as well as termination from
17 parole.⁵⁶ Significantly, a declaration of factual innocence is not equivalent to a judgment of acquittal.⁵⁷

18 Thus, the enumerated list of qualifying conditions precedent for triggering the two-year deadline does
19 not include a declaration of factual innocence under Penal Code section 851.8.

20 The requirements imposed by Penal Code sections 4900 and 4901 are jurisdictional. As
21 confirmed by section 642 of the California Code of Regulations,

22 “Claims that are untimely or are otherwise not in compliance with Penal Code sections
23 4900 and 4901 will be rejected and will not be heard or considered by the Board.”⁵⁸

24 The claimant must be notified of the jurisdictional deficiency and given 30 days to present evidence that
25 will overcome the rejection.⁵⁹ If the claimant submits a response that “does not provide sufficient
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27 ⁵⁴ Pen. Code, § 4900 (emphasis added).

28 ⁵⁵ Pen. Code, § 4901 (emphasis added).

⁵⁶ Pen. Code, § 4901, subd. (b).

⁵⁷ See Pen. Code, § 851.8, subd. (e) (“Whenever any person is acquitted of a charge and it appears to the judge presiding at trial at which the acquittal occurred that the defendant was factually innocent of the charge, the judgment may grant the relief provided in subdivision (b)”).

⁵⁸ Cal. Code Regs., tit. 2, § 642, subd. (a) (emphasis added).

⁵⁹ Cal. Code Regs., tit. 2, § 642, subd. (b)(1)-(2).

1 evidence to prove that the claim was timely filed and is otherwise compliant with the requirements of
2 Penal Code sections 4900 and 4901, the claim will be rejected without a hearing and will not be
3 considered by the Board.”⁶⁰

4 **A. CalVCB Lacks Jurisdiction To Consider Shull’s Application**

5 An application for which jurisdiction is lacking will usually be rejected outright, without a hearing
6 and without consideration by the Board.⁶¹ Nonetheless, a tribunal’s “power to hear or determine the
7 case ... cannot be conferred by waiver, estoppel, or consent.”⁶² The absence of fundamental
8 jurisdiction may be raised at any time.⁶³ As detailed below, CalVCB lacks jurisdiction to consider
9 Shull’s successive and untimely application.

10 **1. Unauthorized Second Claim**

11 Penal Code section 4900 authorizes only “a claim” for compensation. Shull already filed “a
12 claim” in 2010 based upon his erroneous convictions in counts 5 and 7 for assault and sexual battery of
13 Mary D. CalVCB determined that Shull’s 2010 “claim” was untimely filed beyond the two-year deadline
14 imposed by Penal Code section 4901 because Shull had been released from prison 18 years earlier in
15 1992 and terminated from parole 16 years earlier in 1994. After considering briefing by Shull and the
16 AG, CalVCB concluded that Shull’s 2009 habeas litigation “was not a triggering event” within the
17 meaning of section 4901.⁶⁴ Consequently, CalVCB “lack[ed] jurisdiction” to consider Shull’s 2010
18 application.⁶⁵ This determination was affirmed by the Santa Clara Superior Court in writ proceedings
19 and subsequently upheld by the California Court of Appeal.⁶⁶

22 ⁶⁰ Cal. Code Regs., tit. 2, § 642, subd. (d).

23 ⁶¹ Cal. Code Regs., tit. 2, § 642.

24 ⁶² *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.4th 330, 339.

25 ⁶³ *Ibid.*

26 ⁶⁴ Shull PD (08/18/10) at p. 6, located in AG Ex. 6 at p. 47.

27 ⁶⁵ *Ibid.*

28 ⁶⁶ AG Ex. 6 at pp. 145-156; AG Ex. 7.

1 Having fully litigated the rejection of his first claim for compensation, Shull is not authorized to
2 submit a second.⁶⁷ Penal Code section 4900 permits “a” single claim, not multiple claims. Moreover,
3 as noted by the AG at the hearing, Shull’s attempt to submit a second claim for compensation is barred
4 by the doctrine of res judicata, which “prevents relitigation of the same cause of action in a second suit
5 between the same parties,” and “prohibits the relitigation of issues argued and decided in a previous
6 case....”⁶⁸ CalVCB therefore lacks jurisdiction under Penal Code section 4900 to consider Shull’s
7 second application. On this ground alone, it must be rejected.

8 **2. Untimely Filed**

9 Alternatively, Shull’s application is untimely under Penal Code section 4901. The two-year
10 deadline imposed by section 4901 is triggered by a judgment of acquittal, pardon granted, or release
11 from custody, which includes termination from parole.⁶⁹ A finding of factual innocence is not included
12 in this list, nor is it synonymous with an acquittal.⁷⁰ Shull’s parole was terminated in 1994. Thus, even
13 if Shull were permitted a second application, it was due in 1996. Shull, however, did not file the
14 underlying application until 20 years later in 2016. Thus, CalVCB lacks jurisdiction to consider Shull’s
15 second untimely application.⁷¹

16 Whether viewed as an unauthorized second application or an untimely first application,
17 jurisdiction is lacking. Consequently, Shull’s application must be rejected at the threshold.
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20 ⁶⁷ Pen. Code, § 4900 (permitting eligible claimant to “present a claim” for compensation).

21 ⁶⁸ *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (explaining “claim preclusion” and
22 “collateral estoppel” under res judicata principles).

23 ⁶⁹ Pen. Code, § 4901, subd. (a).

24 ⁷⁰ See Pen. Code, § 851.8, subd. (e) (“Whenever any person is acquitted of a charge and it appears to
25 the judge presiding at trial at which the acquittal occurred that the defendant was factually innocent of
26 the charge, the judgment may grant the relief provided in subdivision (b)”).

27 ⁷¹ The AG raised the issue of timeliness in the post-hearing supplemental brief and suggested that the
28 Board give Shull 30 days notice of intent to reject his application on this basis pursuant to Cal. Code
Reg., tit. 2, § 642. (AG Supp. at 4-5.) This regulation applies when an application is rejected outright
without consideration by the Board. Because Shull’s application is being considered by the Board, the
requisite notice is satisfied by providing Shull with a copy of the proposed decision in advance of the
Board’s hearing pursuant to Cal. Code Reg., tit. 2, § 619.4.

1 **B. Penal Code Section 851.865 Does Not Apply To Shull’s Application**

2 But even assuming CalVCB has jurisdiction to consider the merits, Shull’s application must
3 nevertheless be denied for failing to demonstrate both actual innocence and injury. As explained
4 below, the automatic presumption for both elements created by Penal Code section 851.865 does not
5 apply to Shull’s case because he secured a declaration of innocence for only two of his four
6 convictions.

7 When a claim for compensation is properly filed pursuant to Penal Code sections 4900 and
8 4901, CalVCB typically requests a written response from the Attorney General pursuant to Penal Code
9 section 4902, and then an informal hearing ensues in accordance with Penal Code section 4903.⁷²
10 Throughout these proceedings, the applicant bears the burden to prove, by a preponderance of the
11 evidence, that:

- 12 (1) the crime with which he was charged was either not committed at all, or, if
13 committed, was not committed by him, and
14 (2) he sustained injury through his erroneous conviction and imprisonment.⁷³

15 If the applicant satisfies this burden of persuasion for both elements, then pursuant to Penal Code
16 section 4904, CalVCB shall recommend to the Legislature an award of compensation equal to \$140 per
17 day for every day of time spend in custody.⁷⁴

18 An exception to this standard procedure occurs whenever Penal Code section 851.865
19 applies.⁷⁵ According to section 851.865,

20 **If a person has secured a declaration of factual innocence** from the court pursuant
21 to Section 851.8 or 851.86, **the finding shall be sufficient grounds for payment of
22 compensation for a claim made pursuant to Section 4900.** Upon application by the
23 person, the California Victim Compensation Board shall, **without a hearing**, recommend

24 ⁷² Pen. Code, §§ 4902, subd. (a)-(b), 4903, subd. (a); Cal. Code Regs., tit. 2, § 615.1, subd. (a) (“The
25 formal hearing provisions of the Administrative Procedure Act ... do not apply”).

26 ⁷³ Pen. Code, §§ 4903, subd. (a), 4904; *Tennison v. Victim Compensation and Government Claims
27 Board* (2006) 152 Cal. App. 4th 1164.

28 ⁷⁴ Pen. Code, § 4904.

⁷⁵ Pen. Code, § 4902, subd. (a); see also Pen. Code, § 1485.55 (requiring Board to recommend
compensation, without a hearing and within 30 days, upon receipt of an application that includes a
finding of factual innocence by the court that vacated the underlying conviction or granted habeas
relief).

1 to the Legislature that an appropriation be made **and the claim paid pursuant to**
2 **Section 4904.**⁷⁶

3 Penal Code section 4902 adds that, “[i]f the provisions of Section 851.865 ... apply in any claim, the
4 California Victim Compensation Board shall, **within 30 days** of the presentation of the claim, calculate
5 the compensation for the claimant pursuant to Section 4904 and recommend to the Legislature
6 payment of that sum.”⁷⁷

7 Plainly understood, Penal Code section 851.865 compels CalVCB to presume both elements of
8 innocence and injury under Penal Code section 4900 and to calculate payment under Penal Code
9 section 4904 for each day of the applicant’s erroneous imprisonment, all within 30 days and without a
10 hearing. By cross-referencing both section 4900 and 4904, section 851.865 does not supplant the
11 jurisdictional requirements for presenting an application to CalVCB. Rather, section 851.865 mandates
12 compensation for persons whose applications would otherwise be eligible for consideration under
13 section 4900.⁷⁸ The AG’s suggestion that Penal Code section 851.865 only presumes factual
14 innocence, but not injury, is unconvincing in light of this statute’s express prohibition against a hearing.
15 The applicant cannot be expected to demonstrate injury, in 30 days no less, while simultaneously
16 denied a hearing on that issue. Thus, whenever an applicant has obtained a declaration of factual
17 innocence within the meaning of section 851.865, CalVCB’s recommendation for compensation must
18 be automatic and swift.

19 Despite this plain language, an ambiguity nevertheless appears. Specifically, Penal Code
20 section 851.865 fails to identify for which particular convictions a declaration of innocence must be
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23 ⁷⁶ Pen. Code, § 851.865, subd. (a) (emphasis added).

24 ⁷⁷ Pen. Code, § 4902, subd. (a) (emphasis added).

25 ⁷⁸ Indeed, Penal Code section 851.86 expressly provides that, whenever a person’s conviction has
26 been set aside based upon a determination of factual innocence, the “court shall also inform the
27 defendant of the available of indemnity for persons erroneously convicted pursuant to Chapter 5
28 (commencing with Section 4900) of Title 6 of Part 3, and the time limitations for presenting those
claims.” (Pen. Code, § 851.86.) Thus, section 851.86 confirms that the jurisdictional requirements
imposed by Penal Code sections 4900 and 4901 continue to apply to any application with a declaration
of factual innocence.

1 secured.⁷⁹ Is a declaration for just one offense sufficient to trigger an automatic compensation
2 recommendation, even if the applicant was imprisoned for multiple offenses? Or must the declaration
3 of innocence encompass all convictions underlying the applicant's imprisonment in order for section
4 851.865 to apply? The only reasonable answer is the latter, as demonstrated by the statutory scheme
5 for compensation as a whole and the legislative history for section 851.865 in particular.⁸⁰

6 Construing Penal Code section 851.865 to require a declaration of factual innocence for all
7 convictions underlying an applicant's imprisonment best harmonizes the entire statutory scheme for
8 compensation. Penal Code sections 4900, 4903, and 4904 repeatedly require a showing of "injury"
9 sustained by the applicant "through his or her erroneous conviction and imprisonment."⁸¹ Section 4904
10 expressly confirms that the very "purpose" of compensation is to "indemnify[] the claimant" for this
11 injury.⁸² No such injury occurs, however, if the applicant was simultaneously serving a sentence for
12 another valid conviction. As one court aptly explained,

13 "The purpose behind section 4900 is to offer a remedy for individuals who prove their
14 innocence and secure their freedom after they have been erroneously convicted by
15 compensating them for '*each day he or she spent illegally behind bars away from
society, employment, and their loved ones.*'"⁸³

16 Construing Penal Code section 851.865 to require a finding of factual innocence for all convictions
17 ensures that compensation is only automatically awarded to those applicants who necessarily spent
18 every day of their incarceration "illegally behind bars."

19
20 ⁷⁹ This same omission is present in Penal Code section 1485.55, which similarly requires CalVCB to
21 recommend compensation without a hearing and within 30 days if the applicant was found factually
22 innocence during a state or federal habeas proceeding. Section 1485.55 must be construed in the
23 same manner as Penal Code section 851.865, given their similar statutory language and common
legislative history. (See *People v. Etheridge* (2015) 241 Cal.App.4th 800, 808-810 (explaining SB 618
as applied to Pen. Code, § 1485.55).)

24 ⁸⁰ This construction avoids the AG's concern that an automatic presumption would violate the
25 Legislature's intent to limit compensation only to those applicants who have been injured by their
erroneous imprisonment. (AG Supp. at 7.)

26 ⁸¹ Pen. Code, §§ 4900, 4903, subd. (a), 4904.

27 ⁸² Pen. Code, §§ 4904 (emphasis added).

28 ⁸³ *Holmes v. California Victim Compensation & Government Claims* (2015) 239 Cal. App. 4th 1400,
1405 (emphasis added).

1 Any alternate construction would render subdivision (i) of Penal Code section 851.8
2 superfluous. Section 851.8 authorizes arrestees to petition for a finding of factual innocence and
3 details what documents must be destroyed by law enforcement or sealed by the court upon such a
4 finding. Subdivision (i) clarifies that “a finding that an arrestee is factually innocent ... shall be
5 admissible as evidence at a hearing before the California Victim Compensation Board.”⁸⁴ But if a single
6 finding of factual innocence were sufficient to trigger Penal Code section 851.865, then no CalVCB
7 hearings would ever occur at which a finding of factual innocence would be admissible. In order for
8 subdivision (i) to have any significance, section 851.865 must be construed to apply only when a finding
9 of factual innocence has been obtained for all of the applicant’s underlying convictions. Consequently,
10 when a finding of factual innocence has been obtained for less than all convictions and a hearing
11 therefore ensues, subdivision (i) ensures that those findings will be admissible to assist the applicant to
12 prove both innocence and injury.

13 Subdivision (b) of Penal Code section 4903 would be similarly ineffectual if Penal Code section
14 851.865 applied to applications with a finding of factual innocence for some but not all of the applicant’s
15 convictions. Subdivision (b) provides,

16 “In a hearing before the board, *the factual findings and credibility determinations*
17 *establishing the court’s basis for granting a writ of habeas corpus, a motion for new trial*
18 *pursuant to Section 1473.6, or an application for a certificate of factual innocence as*
19 *described in Section 1485.5 shall be binding on the Attorney General, the factfinder, and*
20 *the board.”⁸⁵*

21 Again, if a single declaration were sufficient to trigger section 851.865, then no hearings would ever
22 occur at which CalVCB would be bound by a court’s determinations for granting a certificate of factual
23 innocence. To avoid rendering subdivision (b) null, section 851.865 must be construed to apply only
24 when a declaration of factual innocence has been obtained for all of the applicant’s convictions.

25 ⁸⁴ Pen. Code, § 851.8, subd. (i)(2).

26 ⁸⁵ Pen. Code, § 4903, subd. (b); see also Penal Code section 1485.5, subd. (c) (“In a contested or
27 uncontested proceeding, *the express factual findings made by the court*, including credibility
28 determinations, *in considering a petition for habeas corpus, a motion to vacate judgment pursuant to*
Section 1473.6, or an application for a certificate of factual innocence, shall be binding on the Attorney
General, the factfinder, and the California Victim Compensation Board”) (emphasis added).

1 The legislative history for Penal Code section 851.865 further supports this construction.
2 Section 851.865 was enacted in 2013 as part of Senate Bill (SB) 618, which also amended Penal Code
3 sections 4900 through 4903.⁸⁶ SB 618 was intended to “streamline” the process “for compensating
4 persons who have been exonerated after being wrongfully convicted and imprisoned.”⁸⁷ To that end,
5 SB 618 added section 851.865, as well as Penal Code section 1485.55, so “that if a person has
6 secured a declaration of factual innocence from the court after having his or her conviction set aside,
7 the finding shall be sufficient grounds for payment of compensation for a claim against the state to the
8 VCGB.”⁸⁸ Notably, this language contemplated a single conviction underlying the applicant’s
9 imprisonment, and a finding of factual innocence for that conviction. In other words, a finding of factual
10 innocence was intended for each conviction underlying the applicant’s imprisonment. Consistent with
11 this approach, the author’s comments repeatedly described applicants who would benefit from this
12 process as both “innocent” and “exonerated.”⁸⁹ These adjectives do not apply to applicants, like Shull,
13 who were only partially exonerated and remain guilty of at least one other felony conviction.
14 Accordingly, the legislative history for section 851.865 supports the requirement of a declaration of
15 factual innocence for all of the applicant’s underlying convictions.

16 Any other construction would lead to absurd results. For example, an applicant serving
17 consecutive life sentences for five separate murders, who is then found factually innocent of the first
18 murder only, would automatically receive compensation for every day of his incarceration, even though
19 he was properly imprisoned for life on the remaining four murders. Similarly, as in Shull’s case, an
20 applicant serving two concurrent sentences, one for a valid conviction and another one for which he
21 was later found factually innocent, would automatically receive compensation for every day of

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23 ⁸⁶ Pen. Code, § 851.865, added by Stats. 2013, ch. 800, § 1 (SB 618), effective January 1, 2014; see
24 also Legis. Counsel’s Dig., Sen. Bill No. 618 (2013-2014 Reg. Sess.

25 ⁸⁷ Assem. Floor, Analysis of Sen. Bill No. 618 (2013–2014 Reg. Sess., at p. 1 (emphasis added), Sept.
26 5, 2013.

27 ⁸⁸ Senate Floor, Analysis of Sen. Bill No. 618 (2013–2014 Reg. Sess., at p. 4 (emphasis added), Sept.
28 11, 2013.

⁸⁹ Assem. Floor, Analysis of Sen. Bill No. 618 (2013–2014 Reg. Sess., at pp. 6-7 (emphasis added),
Sept. 5, 2013.

1 imprisonment, even though he was simultaneously serving an entirely lawful sentence.⁹⁰ In either
2 scenario, it would be an affront to the victims of the valid convictions to grant such an undeserved
3 windfall to their assailant.

4 Properly construed, section 851.865 assists a limited group of applicants, who have secured a
5 declaration of factual innocence for all of the convictions underlying their imprisonment, and whose
6 applications otherwise satisfy the jurisdictional requirements imposed by Penal Code sections 4900 and
7 4901. When applicable, section 851.865, together with Penal Code section 4902, compels CalVCB to
8 presume the applicant's innocence and injury and to recommend compensation, without a hearing and
9 within 30 days. Because Shull has secured a declaration of factual innocence for only two of his four
10 convictions, section 851.865 does not apply to his application for compensation.

11 **C. Shull's Application Must Be Denied For Failing To Demonstrate Innocence and Injury**
12 **By a Preponderance**

13 Absent Penal Code section 851.865, Shull bears the burden to demonstrate both innocence and
14 injury by a preponderance. As detailed above, Penal Code section 4900 allows any person, who has
15 been erroneously convicted and imprisoned for a felony offense, to apply for compensation from
16 CalVCB.⁹¹ Following a hearing, CalVCB may recommend compensation only if the applicant proves,
17 by a preponderance of the evidence, that (1) the crime with which he was charged was either not
18 committed at all, or, if committed, was not committed by him and that (2) he sustained an injury through
19 his erroneous conviction and imprisonment.⁹² "Preponderance of the evidence" means evidence that
20 has more convincing force than that opposed to it.⁹³ If the claimant satisfies this burden of persuasion,

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22 ⁹⁰ See *People v. Miller* (1977) 18 Cal.3d 873, 887 ("It has long been established that the imposition of
23 concurrent sentences is precluded by section 654 because the defendant is deemed to be subjected to
24 the term of both sentences although they are served simultaneously"); see also *People v. Kunath*
25 (2012) 203 Cal.App.4th 906, 908 (holding that credit under Pen. Code § 2900.5 for presentence "days
served" applies to concurrent sentences imposed at the same time for unrelated crimes, provided the
defendant was not also in postsentence custody for another crime).

26 ⁹¹ Pen. Code, § 4900.

27 ⁹² Pen. Code, §§ 4903, subd. (a), 4904; *Tennison v. Victim Compensation and Government Claims*
Board (2006) 152 Cal. App. 4th 1164.

28 ⁹³ *People v. Miller* (1916) 171 Cal. 649, 652.

1 then CalVCB shall recommend to the Legislature an award of compensation equal to \$140 per day for
2 every day of time spent in custody.⁹⁴

3 CalVCB hearings are informal, and the traditional rules of evidence do not apply.⁹⁵ Ultimately,
4 all relevant evidence is admissible in a CalVCB hearing “if it is the sort of evidence on which reasonable
5 persons are accustomed to rely in the conduct of serious affairs,” even if a common law or statutory
6 rule “might make its admission improper over objection in any other proceeding.”⁹⁶ Relevant evidence
7 necessarily includes a declaration of factual innocence.⁹⁷ Such a finding is binding upon CalVCB when
8 determining whether the applicant has proven, by a preponderance of evidence, the requisite elements
9 of innocence and injury for compensation.⁹⁸

10 **1. Although Shull Is Factually Innocent of Counts 5 and 7, He Remains**
11 **Guilty of Counts 3 and 4**

12 CalVCB accepts Shull’s declaration of innocence for his convictions on counts 5 and 7 for the
13 assault and sexual battery of Mary D. that occurred in Los Gatos. Not only is the court declaration
14 binding, but it is also persuasive. Shull has consistently maintained his innocence, starting at the plea
15 hearing in 1989, again at the habeas proceedings in 2009, then later at the declaration of innocence
16 proceedings in 2016, and finally at CalVCB’s recent hearing in 2017. The record further reveals that
17 Mary D. recanted her eyewitness identification of Shull, and the District Attorney stipulated to Shull’s
18 innocence.⁹⁹ Accordingly, CalVCB finds that Shull was, indeed, erroneously convicted on counts 5 and
19 7 because he was actually innocent of those offenses.

20 However, CalVCB also finds that Shull was not erroneously convicted on counts 3 and 4
21 involving Nina T. To the contrary, there is overwhelming evidence of his guilt. Shull, who was 31 years

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24 ⁹⁴ Pen. Code, § 4904.

25 ⁹⁵ See Cal. Code Regs., tit. 2, § 615.1, subd. (a).

26 ⁹⁶ Cal. Code Regs., tit. 2, § 641, subds. (c) & (d).

27 ⁹⁷ Pen. Code, § 851.8, subd. (i).

28 ⁹⁸ Pen. Code § 4903, subd. (b).

⁹⁹ Shull Ex. A; AG Ex. 6 at pp. 72-77.

1 old, approached 16-year-old Nina T. at a bus stop, after she supposedly smiled at him.¹⁰⁰ Shull sat
2 down next to Nina T., placed his hand on her bare leg, and said, “Nice legs.”¹⁰¹ Shull thought Nina T.
3 was “very pretty” and he was “attracted” to her.¹⁰² According to Shull, Nina T. “rebuffed” him by
4 standing up and hurriedly walking away, which caused Shull to lose his temper.¹⁰³ Shull admitted that
5 he “pursued the girl” over a distance of 15 feet until he finally “grabbed” her and “pushed her down,”
6 which resulted in her fall to the ground and “incidental” injuries and dental work.¹⁰⁴ By comparison,
7 Nina T. vividly testified that she ran out into the middle of the street to get away from Shull, but he
8 continued chasing her.¹⁰⁵ When Shull finally caught up to Nina T., he grabbed her hand and then
9 covered her mouth as she screamed for help.¹⁰⁶ Nina T. continued struggling to get away, and Shull
10 said, “You bitch.”¹⁰⁷ Shull grabbed Nina T. by her arm and neck and picked her up a few inches off the
11 ground.¹⁰⁸ Then Shull “pushed” Nina T., causing her face to hit the pavement, which chipped two of her
12 front teeth in half and completely knocked out a third.¹⁰⁹ Nina T. remained in the street, with her head
13 on the ground, too tired to move.¹¹⁰ Shull fled the scene.¹¹¹ An ambulance eventually arrived and
14 transported Nina T. to the hospital for treatment of “a severe abrasion to her upper lip, an abrasion to
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19 ¹⁰⁰ AG Ex. 3 at pp. 2-3, 15.

20 ¹⁰¹ AG Ex. 3 at pp. 2-3.

21 ¹⁰² AG Ex. 3 at pp. 2, 15.

22 ¹⁰³ AG Ex. 3 at p. 15.

23 ¹⁰⁴ AG Ex. 3 at pp. 5, 15.

24 ¹⁰⁵ Shull Reply Ex. 10 at p. 91.

25 ¹⁰⁶ Shull Reply Ex. 10 at p. 91.

26 ¹⁰⁷ Shull Reply Ex. 10 at p. 92.

27 ¹⁰⁸ Shull Reply Ex. 10 at p. 94.

28 ¹⁰⁹ Shull Reply Ex. 10 at p. 95.

¹¹⁰ Shull Reply Ex. 10 at p. 95.

¹¹¹ AG Ex. 3 at pp. 5, 15.

1 her right shoulder, and bruises to both knees,” as well as her three damaged teeth.¹¹² Nina T.
2 eventually “had her teeth capped and had visited a dentist on several occasions following the attack.”¹¹³

3 This evidence overwhelmingly supports Shull’s convictions for felony assault in count 3, with a
4 great-bodily enhancement, and misdemeanor molesting a child in count 4. Indeed, Shull was lucky to
5 avoid additional convictions for attempted kidnapping and false imprisonment, as originally charged in
6 counts 1 and 2.¹¹⁴

7 As for Shull’s challenge to the “legitimacy” of his conviction for assaulting Nina T. due to the
8 great-bodily injury enhancement, it is unfounded. At the time of Shull’s offenses, former Penal Code
9 section 245 prohibited “[a]ny person who commits *an assault upon the person of another* with a deadly
10 weapon or instrument other than a firearm or *by any means of force likely to produce great bodily*
11 *injury...*”¹¹⁵ Former Penal Code section 12022.7 imposed a three-year enhancement for “[a]ny person
12 who *personally inflicts great bodily injury* on any person other than an accomplice in the commission or
13 attempted commission of a felony..., *unless infliction of great bodily injury is an element of the offense*
14 of which he or she is convicted.”¹¹⁶ The term “great bodily injury” means “a significant or substantial
15 physical injury.”¹¹⁷

16 Contrary to Shull’s understanding, felony assault under former section 245 merely required an
17 application of force *likely* to produce great bodily injury, regardless of whether or not any such injury
18 actually occurred. Thus, great bodily injury was not an element of section 245. Consequently, if the
19 assault actually did produce great bodily injury, then the enhancement under section 12022.7 applied.
20 Because the amount of force applied by Shull was not only *likely to produce* great bodily injury, but
21 *actually did produce* such an injury, he was properly charged and convicted of assault plus an
22 enhancement. The increased punishment was commensurate with Shull’s increased culpability for not

23 ¹¹² AG Ex. 3 at p. 3.

24 ¹¹³ AG Ex. 3 at p. 3.

25 ¹¹⁴ AG Ex. 1 at p. 1.

26 ¹¹⁵ Former Pen. Code, § 245, subd. (a)(1) (West. 1998 ed.) (emphasis added).

27 ¹¹⁶ Former Pen. Code, § 12022.7, subd. (a) (West. 1998 ed.) (emphasis added).

28 ¹¹⁷ Former Pen. Code, § 12022.7, subd. (e).

1 just pushing Nina T. in a manner likely to cause great bodily injury, but for actually causing Nina T. to
2 suffer great bodily injury in the form of three broken front teeth, as well as a severe abrasion to her
3 upper lip. Accordingly, Shull's conviction and sentence on count 3 for assault with a great-bodily-injury
4 enhancement was entirely proper as a matter of law.

5 In sum, Shull has proven, by a preponderance of the evidence, that he is factually innocent of
6 his erroneous convictions for the assault and sexual battery of Mary D. in counts 5 and 7.
7 Nevertheless, Shull remains guilty of his valid convictions for the assault and molest of Nina T. in
8 counts 3 and 4.

9 **2. Shull Was Not Injured By His Erroneous Conviction on Counts 5 and 7**
10 **Due To His Simultaneous Imprisonment On Counts 3 and 4**

11 Because Shull was properly incarcerated for an aggregate term of five years on count 3, while
12 also serving a one-year concurrent sentence on count 4, he fails to prove that he sustained injury within
13 the meaning of Penal Code section 4900 for his concurrent imprisonment of two and three years,
14 respectively, on counts 5 and 7. Shull's claim for compensation must therefore be denied.

15 Penal Code section 4900 is not a remedy for every mistake by the criminal justice system. This
16 system strives to be fair, but it cannot be perfect.¹¹⁸ For egregious and intentional misconduct, the
17 wrongfully convicted may pursue civil actions against the state for malicious prosecution or false
18 imprisonment.¹¹⁹ Otherwise, section 4900 limits compensation to erroneously convicted felons "for the
19 pecuniary injury sustained by him or her through the erroneous conviction and imprisonment or
20 incarceration."¹²⁰ The injury to be compensated under section 4900 is "each day he or she spent
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24 ¹¹⁸ *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 ("Constitution entitles a criminal defendant to a
fair trial, not a perfect one").

25 ¹¹⁹ See CACI No. 1500 (defining "malicious prosecution" to include element that "no reasonable person
26 in defendant's circumstances would have believed that there were grounds for causing plaintiff to be
27 arrested or prosecuted"); see also CACI No. 1400 (defining "false imprisonment" to include element
that defendant "intentionally caused plaintiff to be wrongfully arrested").

28 ¹²⁰ Pen. Code, § 4900.

1 illegally behind bars, away from society, employment, and their loved ones.”¹²¹ For this very reason,
2 the rate of compensation is entirely based upon the number of days of the applicant’s incarceration for
3 the erroneous conviction.¹²² Thus, no injury occurs, within the meaning of section 4900, when the
4 applicant simultaneously “remained incarcerated on a separate, unrelated conviction....”¹²³

5 Given these statutory limitations, some mistakes by the criminal justice system will go without
6 compensation. For example, wrongfully convicted misdemeanants lack a remedy under section 4900.
7 Properly convicted felons, who served additional time for an erroneous enhancement, also lack a
8 remedy under section 4900. Innocent arrestees, who are incarcerated pending trial, additionally lack a
9 remedy under section 4900 if they were never convicted. And finally, persons like Shull, who served
10 concurrent sentences for a valid and erroneous felony conviction, similarly lack a remedy under section
11 4900, even if the erroneous conviction triggered more onerous terms of confinement or greater
12 hardships upon release.

13 CalVCB accepts Shull’s representation that he endured heightened restrictions while in prison
14 as a result of his two erroneous convictions, such as limited prison job opportunities and increased
15 harassment from fellow inmates. CalVCB further accepts Shull’s representation that he suffered
16 additional adversities following his release from prison as a result of these two erroneous convictions.
17 For instance, it may have been easier for Shull to obtain employment if he had only one felony
18 conviction for assault, as opposed to three felony convictions for assault and sexual battery. But even if
19 Shull had not been erroneously convicted of sexual battery, he still would have been required to
20 register as a sex offender for his misdemeanor molest conviction, and his registration status for that
21 offense still would have been publically available.¹²⁴ On the other hand, Shull may have been able to

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23 ¹²¹ *Holmes v. California Victim Compensation and Government Claims Board, supra*, 239 Cal.App.4th
24 at 105.

25 ¹²² Pen. Code, § 4904.

26 ¹²³ *Fudger v. State* (N.Y. App. 1987) 131 A.D.2d 136, 141 (“The fact that claimant remained
27 incarcerated on a separate, unrelated conviction vitiates any claim of damage attributable to the arson
28 conviction” under state compensation statute for erroneously convicted).

¹²⁴ Former Pen. Code, § 290.4, subd. (a)(1) (West 2001 ed.) (listing both felony sexual battery and
misdemeanor molest as triggering offenses for public listing as registered sexual offender).

1 terminate his registration duty earlier, had it not been for his erroneous sexual battery conviction.¹²⁵
2 Most significantly, had it not been for the sexual battery conviction, Shull would not have been charged
3 as a felony for failing to register as a sex offender, nor would he have faced a life sentence under the
4 Three Strikes law for that offense.

5 No doubt, Shull suffered unwarranted hardships as a result of his erroneous convictions on
6 counts 5 and 7 for the assault and sexual battery of Mary D. Nonetheless, Shull did not serve a single
7 extra day in prison as a result of these erroneous convictions.

8 Shull was sentenced on counts 5 and 7 to two and three years, respectively. These sentences
9 were concurrently imposed with Shull's aggregate sentence of five years on count 3 for the assault of
10 Nina T. with a great-bodily injury enhancement. When selecting this sentence for count 3, the trial court
11 emphasized that it was solely considering the egregious facts of the Nina T. incident and "accept[ed] for
12 the moment" Shull's innocence for the Mary D. incident.¹²⁶ The court concluded that, "without a doubt,
13 ... a state prison sentence is appropriate" because Shull had "terrorized" Nina T. and "hurt her badly"
14 and "she is never going to be the same person she was before it happened."¹²⁷ The court continued,
15 "When you assault a stranger in a sexual context, and overpower her and throw her to the ground and
16 cause disfigurement, ... you can't begin to understand how shattering that it is to her."¹²⁸ The court
17 wanted Shull "to think about" how his actions had harmed Nina T. and noted that Shull would "have
18 some time to think about it now."¹²⁹ Although the court insisted that Shull serve a prison sentence for
19 his actions towards Nina T., the court ultimately selected the lowest term because of Shull's mitigating
20 circumstances, which included his military service, recent college degree, and no prior felony
21 convictions.¹³⁰

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23 ¹²⁵ Former Pen. Code, § 290.5 (West 2001 ed.) (terminating registration duty based upon misdemeanor
24 molest with only certificate of rehabilitation, whereas sexual battery required full pardon).

25 ¹²⁶ AG Ex. 4 at p. 4.

26 ¹²⁷ AG Ex. 4 at pp. 3-4.

27 ¹²⁸ AG Ex. 4 at p. 4.

28 ¹²⁹ AG Ex. 4 at p. 5.

¹³⁰ AG Ex. 4 at p. 5.

1 This record confirms that Shull's aggregate five-year sentence was entirely attributable to his
2 valid conviction on count 3 for assaulting Nina T. Consequently, Shull's erroneous convictions on
3 counts 5 and 7 did not have any impact, whatsoever, upon the duration of his imprisonment. For every
4 day that Shull served on his concurrent sentences for counts 5 and 7, he was simultaneously serving
5 an even longer sentence on an entirely valid conviction for count 3.¹³¹ As Shull's former attorney
6 succinctly explained, because "5 years was the low end on the San Jose case which was NOT the
7 subject of the factual innocence finding, and [] the sentence on the [Mary D.] case was concurrent, []
8 you received no actual additional confinement as a result of the [Mary D.] case."¹³²

9 After considering all of the evidence and arguments presented, Shull has failed to demonstrate,
10 by a preponderance of the evidence, that he served any additional period of incarceration as a result of
11 his erroneous convictions on counts 5 and 7. To the contrary, the evidence overwhelming
12 demonstrates that Shull did not serve a single extra day in prison for the Mary D. offenses. As a result
13 of this determination, Shull has failed to prove the requisite injury under Penal Code section 4900.
14 Therefore, Shull is not eligible for compensation as an erroneously convicted person.

15 In sum, Shull's second and untimely application for compensation must be rejected for lack of
16 jurisdiction. Alternatively, even if jurisdiction applies, Shull's application must be denied on the merits
17 because he does not qualify for automatic compensation under Penal Code section 851.865, and he
18 has failed to demonstrate the requisite injury under Penal Code section 4900. Compensation is
19 therefore denied.

20
21 Date: August 30, 2017

22 _____
23 Laura Simpton
24 Hearing Officer
25 California Victim Compensation Board

26 _____
27 ¹³¹ See *People v. Miller, supra*, 18 Cal.3d at p. 887 (recognizing that concurrently-imposed sentences
28 "are served simultaneously").

¹³² AG Ex. 9 at 1.

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

In the Matter of the Claim of:

George E. Shull

PC 4900 Claim No. 16-ECO-11

Notice of Decision

On September 21, 2017, the California Victim Compensation Board voted 2-1 to adopt the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: September 28, 2017

Tisha Heard
Board Liaison
California Victim Compensation Board