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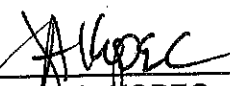
BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Claim of:
Roy Alvarez
Claim No. G534815

Notice of Decision

On October 29, 2004, the California Victim Compensation and Government Claims Board adopted the attached Proposed Decision as its Decision in the above-referenced matter. The Decision became effective on October 29, 2004.

Date: November 3, 2004


JUDITH A. KOPEC
Chief Counsel
California Victim Compensation
and Government Claims Board

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3 BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
4 OF THE STATE OF CALIFORNIA
5

6 In the Matter of the Claim of:

7 Roy Alvarez

8 Claim No. G534815

Proposed Decision

(Penal Code § 4900 et seq.)

9 A hearing on this claim was held in Sacramento, California, by Deborah Bain, Hearing
10 Officer, who was assigned to hear this matter by the Executive Officer of the Victim Compensation
11 and Government Claims Board (Board).¹ The law firm of Moreno, Becerra, Guerrero & Casillas
12 represents Roy Alvarez. Attorney Arnoldo Casillas waived Mr. Alvarez's appearance, waived 15
13 days' notice of the hearing pursuant to Penal Code section 4902, and agreed to have an informal
14 hearing conducted by the hearing officer upon the written record. Mr. Alvarez did not attend the
15 hearing.

16 Deputy Attorney Michael P. Farrell represented the Attorney General in this matter.
17 Mr. Farrell also waived his appearance; waived 15 days' notice of the hearing pursuant to Penal
18 Code section 4902, and agreed to have an Informal hearing conducted upon the written record.

19
20 **Findings of Fact**

21 1. Mr. Alvarez submitted a claim under Penal Code section 4900 *et seq.* On March 12,
22 2003. Mr. Alvarez claims that he was erroneously convicted of two robberies occurring on September
23 9, 2002.²

24 2. In support of his Penal Code section 4900 claim, Mr. Alvarez attached three
25 documents: 1) his Petition for Habeas Corpus in case no. NA022963-01, volume I of II; 2) Volume II, a
26 list of exhibits; and 2) a copy of the court order granting the petition.

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29 ¹ Mr. Alvarez cited September 9, 2002 as the incident date. September 9, 2002 was the date the court granted the Petition for Habeas Corpus.

1 3. On June 18, 2004, the Board's Chief Counsel, Judith A. Kopec sent a letter to
2 Mr. Casillas of the law firm of Moreno, Becerra, and Guerrero & Casillas. In the letter, Ms. Kopec
3 informed Mr. Casillas that if he wished to submit any additional information supporting Mr. Alvarez's
4 claim, he must submit it by July 1, 2004. To date, no additional information has been received.

5 4. The court order reflects that the Los Angeles Superior Court addressed
6 Mr. Alvarez's Writ of Habeas Corpus in case no. NA022963-01 on September 9, 2002. On that date,
7 the People stated no opposition and the court granted the petition.

8 5. Deputy Attorney General Jennifer Runte reviewed Mr. Alvarez's 4900 claim and
9 recommended denial. In conducting her review, she read and considered Mr. Alvarez's Petition for Writ
10 of Habeas Corpus and his claim for money damages. In addition, she contacted Los Angeles County
11 Deputy District Attorney John Zajec who analyzed the charges against Mr. Alvarez as well as his
12 Habeas Petition.

13 6. According to Mr. Zajec, Mr. Alvarez was a "Third Striker" with at least 25 prior robbery
14 convictions³. The criminal case that was the basis of Mr. Alvarez's Habeas Petition arises out of a
15 series of robberies that occurred in the Los Angeles area during the period of November 24, 1994 –
16 December 5, 1994.

17 7. In his Writ, Mr. Alvarez argues that he would not have been convicted except for 1)
18 incompetence of counsel; and 2) prosecutorial misconduct based on *Brady* violations for failing to
19 disclose potentially exculpatory information. The basis of the *Brady* violations stem from the District
20 Attorney's failure to disclose the similarities in the *modus operandi* of robberies being committed during
21 the same time period and general geographic area by a Raul Silva, a "third striker."

22 8. Under *Brady*, the prosecution is charged with constructive knowledge of the similarities
23 between the Silva robbery *modus operandi* and those in the robberies charged to Mr. Alvarez and had
24 a duty to disclose this information to Mr. Alvarez.⁴

25 9. According to Mr. Alvarez's writ, the first crime he was charged with occurred on
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29 ² Mr. Zajec's memo of August 22, 2002, page 3.

³ Mr. Zajec's memo of August 22, 2002, page 3.

1 November 24, 1994 in Carson, California at Tom's Burger. On that date, Manager Lionel Brambila and
2 Marcia Garcia were working at Tom's. A man entered at approximately 10:30 a.m. and asked about the
3 specials. Mr. Brambila referred the man to a list and the man ordered. When Ms. Garcia told the man
4 the tab amount, the man pulled out a gun. The man told Ms. Garcia that it was a hold up and not to
5 move. The man jumped over the counter and instructed Ms. Garcia to open the register. He took \$500.
6 He pointed a gun at Mr. Brambila and instructed him not to move. He jumped over the counter and
7 left.⁵

8 10. The second crime occurred on December 5, 1994. Mr. Brambila, Ms. Garcia and
9 another employee, Gloria Estanislao were working at Tom's. At approximately 12:20 p.m., the man
10 who had robbed Tom's on November 24, 1994 entered the premises. He took out a gun and instructed
11 everyone not to move. He jumped over the counter again and told Ms. Garcia to open the cash
12 register. She gave him the money. She then instructed Ms. Estanislao to give him the money from her
13 register, which she did. The man pointed the gun at Mr. Brambila, jumped back over the counter and
14 left.⁶

15 11. Another robbery occurred at a Jeans-for-Less store. Very little information was provided
16 with respect to that crime. According to Mr. Alvarez's writ, a man brought merchandise to the counter
17 as if he wanted to buy the items. The man then displayed a gun. He told Moheb Hanna to open the
18 cash register. The man then took the money out of the register. Mr. Alvarez and the Deputy Attorney
19 General did not provide the date and location of this crime.

20 12. Ms. Medina described the robber as 25 to 32 years old, very thin, with a black
21 mustache, chiseled face, large eyes, and acne scars or a pock marked face.⁷ Ms. Estanislao told police
22 that the robber was thin and a little taller than 5 feet.⁸

23 13. During the investigation of these robberies, several witnesses identified Mr. Alvarez as
24 the robber of the Tom's Burger and Jeans-for-Less from a photo line-up. The photo line-up for the
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27 ⁴ Mr. Alvarez's Writ, page 7.

28 ⁵ Mr. Alvarez's Writ, pages 7 and 8.

29 ⁶ Mr. Alvarez's Writ, pages 8 and 15.

⁷ Mr. Alvarez's Writ, page 9.

1 Tom's robberies occurred three to six weeks after the crimes.⁹ Cecilia Medina and Gloria Estanislao
2 said they were 100% positive when they made their photo identification.¹⁰ Mr. Hanna also identified
3 Mr. Alvarez as the perpetrator.¹¹ Ms. Garcia told the investigator that she was "80 per cent sure" when
4 she picked Mr. Alvarez from the photo line-up.¹² When shown the photo line-up, she said that
5 Mr. Alvarez picture in the photo line-up looked like the robber.¹³ Mr. Brambila could not identify anyone
6 in the photo line-up.¹⁴

7 14. Mr. Alvarez was arrested on January 12, 1995. The District Attorney charged
8 Mr. Alvarez with eight counts of second-degree robbery with six gun use allegations
9 (Pen. Code §§ 211, 12022.5). Three prior prison terms, two prior serious felonies, and two prior strikes
10 were also alleged. (Pen. Code §§ 667.5, subd. (b), 667, subdiv. (a); 667, subds. (b) –(j).)¹⁵ The counts
11 are as follows:

12 Count I – Tom's Burger robbery, November 28, 1994, against Maria Garcia.

13 Count II - Tom's Burger robbery, November 28, 1994, against Lionel Brambila.

14 Count III - Tom's Burger robbery, December 5, 1994, against Lionel Brambila.

15 Count IV - Tom's Burger robbery, December 5, 1994, against Maria Garcia.

16 Count V - Tom's Burger robbery, December 5, 1994, against Gloria Estanislao.

17 Count VI – Jeans-for-Less robbery, against Moheb Hanna.¹⁶

18 Count VII – unclear from the record.¹⁷

19 Count VIII – unclear from the record.¹⁸

20 15. During the trial, all but two of the witnesses who had made the earlier photo
21 identifications said that Mr. Alvarez was not the perpetrator, despite earlier identifications.¹⁹ Ms. Garcia
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24 ⁸ Mr. Alvarez's Writ, page 13.

25 ⁹ Mr. Alvarez's Writ, Officer Marquez's testimony at trial, page 9, and AG Runter's letter of September 22, 2003, page 2.

26 ¹⁰ Mr. Alvarez's Writ, Officer Marquez's testimony at trial, page 8, and AG Runte's letter of September 22, 2003, page 2.

27 ¹¹ Attorney General letter of September 22, 2003, page 2.

28 ¹² Mr. Alvarez's Writ, page 9.

29 ¹³ Mr. Alvarez's Writ, page 9.

¹⁴ Mr. Alvarez's Writ, page 5.

¹⁵ The date of this robbery was not provide by the claimant or the AG.

¹⁶ AG Runte's letter of September 22, 2003, page 3.

¹⁷ AG Runter's letter of September 22, 2003, page 3.

¹⁸ Mr. Zajec's Memo of August 22, 2002.

1 testified that Mr. Alvarez was not the robber.²⁰ She cited several factors that distinguished Mr. Alvarez
2 from the robber including height, age and weight differentials.

3 16. At trial, Ms. Estanislao testified that Mr. Alvarez looked like the robber but she wasn't
4 certain. She said that Mr. Alvarez was heavier than the robber and had a lighter complexion, but his
5 hairline and mustache resembled the robber's.²¹ The investigator, Officer Marquez, testified that
6 Ms. Estanislao said that she was 100% sure when she identified Mr. Alvarez during the photo line
7 up.²²

8 17. Ms. Medina testified that Mr. Alvarez was heavier than the perpetrator, that his face was
9 heavier, and he did not have the acne scars that the perpetrator had.²³ Officer Marquez testified that
10 Ms. Medina said that she was 100% sure when she identified Mr. Alvarez during the photo line up.²⁴
11 Officer Marquez testified that Mr. Alvarez had a pockmarked face and that he was 20 to 25 pounds
12 heavier at trial than he was at the time of his arrest.²⁵

13 18. Mr. Brambila estimated that the both robberies at Tom's took between three to five
14 minutes.²⁶ Mr. Brambila testified that the robber was 5 foot 6 inches, about 140 pounds and that the
15 same person robbed Tom's twice.²⁷ As with the photo line-up, Mr. Brambila was unable to identify
16 Mr. Alvarez as the perpetrator.²⁸ Mr. Hanna identified Mr. Alvarez as the individual who robbed Jeans-
17 for-Less.²⁹

18 19. Counts I, II, VII and VIII were dismissed on a motion under Penal Code section 1118.1,
19 a judgment of acquittal based on insufficient evidence to sustain a conviction.³⁰ On the remaining
20 counts, the prosecutor argued to the jury that Ms. Medina, Ms. Estanislao, and Ms. Garcia were unable
21 to identify Mr. Alvarez at trial due to his weight gain and the passage of time.³¹ The prosecutor used the
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23 ¹⁹ Mr. Alvarez's Writ, page 8.

24 ²⁰ Mr. Alvarez's Writ, page 9.

25 ²¹ Mr. Alvarez's Writ, page 9.

26 ²² Mr. Alvarez's Writ, page 9.

27 ²³ Mr. Alvarez's Writ, page 9.

28 ²⁴ Mr. Alvarez's Writ, pages 15 and 16.

29 ²⁵ Mr. Alvarez's Writ, page 12.

²⁶ Mr. Alvarez's Writ, page 9.

²⁷ Mr. Alvarez's Writ, page 9.

²⁸ Mr. Alvarez's Writ, page 5.

²⁹ Mr. Alvarez's Writ, page 5.

³⁰ Mr. Alvarez's Writ, pages 16 and 44.

1 confidence of Ms. Medina, Ms. Estanislao, and Ms. Garcia of their identification at the time of the photo
2 line up to establish the accuracy of the identifications. He emphasized that both Ms. Medina and
3 Ms. Estanislao stated at the time of their photo identifications that they were 100% certain that
4 Mr. Alvarez was the perpetrator, and Ms. Garcia was 80% sure.³²

5 20. Mr. Alvarez asserts that the prosecutor based his case on the strength of Hanna's
6 identification to establish Mr. Alvarez's guilt on all counts. Mr. Hanna had identified Mr. Alvarez as the
7 perpetrator at the photo line-up, at the preliminary hearing, and at trial.³³ The prosecutor told the jury
8 that the person who did one robbery did them all because all the robberies were committed in a
9 distinctive manner. The prosecutor also noted that these robberies with this *modus operandi* ceased
10 once Mr. Alvarez was arrested.

11 21. The jury convicted Mr. Alvarez on four counts and found four gun use allegations to be
12 true.³⁴ After the trial, Mr. Alvarez sent a letter to Mr. Hanna informing Mr. Hanna that he was not the
13 robber, but that Mr. Silva was the individual who committed the crime.³⁵ Mr. Hanna requested to see a
14 photo of Mr. Silva. When the police showed him a six-card photo line up, he picked Mr. Silva as the
15 robber.³⁶ The defense requested and was granted a new trial on the count of robbery against
16 Mr. Hanna at Jeans-for-Less and one count of robbery against Lionel Brambila occurring on December
17 5, 1994 at Tom's Burgers.³⁷

18 22. Mr. Alvarez was sentenced to fourteen years prison on the one count of robbery against
19 Maria Garcia and one count of robbery against Gloria Estanislao that occurred on December 5, 1994.

20 23. Mr. Alvarez filed his writ alleging: 1) incompetence of counsel; 2) that Mr. Silva
21 committed these crimes; and 3) the District Attorney's failure to disclose information on Mr. Silva's
22 crimes prior to Mr. Alvarez's trial was a *Brady* violation and prosecutorial misconduct.

23 24. Concerning the claim of incompetence of counsel, Mr. Alvarez argues that a reasonably
24 competent attorney would have: 1) sought an expert opinion on the accuracy of eyewitness
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27 ³¹ Mr. Alvarez's Writ, pages 11 - 12.

³² Mr. Alvarez's Writ, page 5.

³³ Mr. Alvarez's Writ, page 5.

³⁴ Mr. Alvarez's Writ, page 5.

³⁵ Mr. Alvarez's Writ, page 5.

³⁶ Mr. Alvarez's Writ, page 5.

1 identification where the prosecution's case rested primarily on eyewitness identification; 2) introduced
2 expert opinion on the specific problems with reliability of the identification and with the reliability of
3 eyewitness identification in general; and 3) called his alibi witnesses.³⁸

4 25. According to Mr. Alvarez, Raul Silva's robberies were nearly identical to the Tom's
5 Burgers robberies. Two weeks before the first Tom's robbery, at 9:15 p.m. on November 14, 1994,
6 Deoc Shin and Andrea Flores were working at the Video Shack at 1358 N. Avalon in Wilmington. The
7 Video Shack is about 1.3 miles from Tom's Burger in Carson. Ms. Shin was the owner of the video
8 store. On that day, Mr. Silva approached and asked for a video. Mr. Shin sent another employee to
9 search for the video. The man then pulled out a blue steel semiautomatic handgun and jumped over
10 the counter. Mr. Silva instructed Mr. Shin to lie down and told Ms. Flores to open the cash register.
11 Mr. Silva took \$300 from the register and left.³⁹

12 26. Ten days later on November 24, 1993, Mr. Silva entered the Video Shack. He pointed a
13 gun at Ms. Flores and said, "You know the routine." Mr. Shin was in the rear office when he heard
14 Ms. Flores crying. Mr. Silva jumped over the counter and approached Mr. Shin. Mr. Silva pulled
15 Mr. Shin by the hair to the ground. Mr. Silva told Ms. Flores to open the register. Mr. Silva then kicked
16 Mr. Shin and demanded his wallet. Mr. Silva took money from Mr. Shin and from the cash register.⁴⁰
17 Mr. Shin identified Mr. Silva as the robber.⁴¹ Mr. Silva was arrested on December 28, 1994 and pled
18 guilty to one count of robbery on September 20, 1996.⁴²

19 27. According to Mr. Alvarez, Mr. Silva has a visibly pockmarked face. When Mr. Silva was
20 arrested, an officer described him as 5 feet 8 inches and skinny.⁴³ According to Mr. Alvarez, the
21 eyewitnesses to the crimes he was charged with described an individual markedly different than
22 himself. The witnesses described the perpetrator's height from anywhere between taller than 5 feet to
23 5 feet 6 inches and his weight as between 140 to 150 pounds or very thin and with a thin face.⁴⁴

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26 ³⁷ Mr. Alvarez's Writ, page 10.

³⁸ Mr. Alvarez's Writ, pages 21 - 26.

27 ³⁹ Mr. Alvarez's Writ, page 22.

⁴⁰ Mr. Alvarez's Writ, page 22.

28 ⁴¹ Mr. Alvarez's Writ, page 22.

⁴² Mr. Alvarez's Writ, page 23.

29 ⁴³ Mr. Alvarez's Writ, page 12.

1 28. Mr. Alvarez's driver's license, which was issued about eight months before trial,
2 indicated that Mr. Alvarez was 5 feet 10 inches and weighed 195 pounds⁴⁵. A physical exam conducted
3 on April 27, 1994, approximately eight months before trial, showed Mr. Alvarez to be 5 feet 11 inches
4 and 214 pounds.⁴⁶ Mr. Alvarez's picture in the photo line-up depicts him with a thin face. Mr. Alvarez
5 was arrested on January 12, 1995. According to Mr. Alvarez, when the line-up photo is compared to
6 his booking photo and his driver's license photo, his face is noticeably heavier in the booking photo and
7 driver's license photo. Mr. Alvarez states that his attorney attempted to introduce a December 1994
8 photo of him to show that he was stocky at the time of the robberies but the court excluded the photo.
9 Mr. Alvarez states that the photo, with the other evidence, would have shown that he was heavy, not
10 slender as the robber was described.

11 29. Additionally, Mr. Alvarez asserts that he did not match the description of the robber for
12 other reasons. For example, witnesses described the robber as having acne scars or a pockmarked
13 face.⁴⁷ A certified plastic surgeon has subsequently examined Mr. Alvarez's face and expressed the
14 opinion that Mr. Alvarez has never had acne.⁴⁸ Mr. Alvarez further asserts that he has a mole on his
15 cheek, and none of the witnesses mentioned that he had a mole.⁴⁹

16 30. Mr. Alvarez states that if his attorney had called an expert, the expert could have
17 testified that there are many factors that could have adversely affected the memory of the witnesses
18 regarding their perception of the robber: 1) the brief duration of exposure to the robber; 2) the fact that
19 a weapon was drawn, thereby focusing the witnesses' attention to the gun instead of the features of
20 the robber; 3) the time delay between the robberies and the identification; 4) the fact that the officer
21 that administered the photographic line-up knew who the suspect was; and 6) the quality of the line-up.

22 31. Mr. Alvarez states that he had alibi evidence that his attorney failed to present.
23 According to Mr. Alvarez, he was working at the Equal Opportunity Center (EOC) with an Irene Alvarez
24 on November 28, 1994. On that day, Markecie Foster went to the EOC to seek help in finding a job.
25 She arrived before office hours. Mr. Alvarez states that he arrived around 8:30 a.m. He met with
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27 ⁴⁴ Mr. Alvarez's Writ, pages 12 and 13.

28 ⁴⁵ Mr. Alvarez's Writ, pages 12 and 15.

29 ⁴⁶ Mr. Alvarez's Writ, pages 9 and 15.

⁴⁷ Mr. Alvarez's Writ, page 15.

⁴⁸ Mr. Alvarez's Writ, page 15.

1 Ms. Foster and gave her an application. Around 9:00 a.m., Mr. Alvarez took Ms. Foster into
2 Ms. Alvarez's office. Ms. Foster discussed her job application with Ms. Alvarez. He states that
3 Ms. Foster was able to see him as she met with Ms. Alvarez. Ms. Foster left the building around 10:00
4 a.m.⁵⁰

5 32. Additionally, there was another alibi witness who was not called. According to
6 Mr. Alvarez, Ruben Bazaure was also at the EOC on November 28, 1994. He arrived between 10:15
7 a.m. and 10:30 a.m. He spoke to a man who identified himself as Ray Alvarez. He met with
8 Ms. Alvarez. As he was meeting with Ms. Alvarez, he saw the man sitting in an office. Mr. Bazaure was
9 in the EOC office until 11 a.m. Mr. Bazaure did not see the man leave the office while he was there.⁵¹
10 Mr. Bazaure was subpoenaed to testify at Mr. Alvarez's trial but he was never called as a witness.⁵²

11 33. According to Mr. Alvarez, an individual named Daniel Williams called the EOC on
12 November 28, 1994. He spoke to a man who identified himself as Roy. Mr. Williams made an
13 appointment at the EOC for that day. Mr. Williams arrived at 11:00 a.m. A man named Roy directed
14 him to another person to fill out the paperwork. Mr. Williams told this information to Mr. Alvarez's trial
15 investigator.⁵³

16 34. The distance between EOC and Tom's Burger is approximately 18.2 miles. The driving
17 time is between 33 and 34 minutes.⁵⁴ Mr. Alvarez did not attach with his claim the declarations for
18 Ms. Foster, Mr. Bazaure Mr. Williams, or the individual who estimated the distance between Tom's
19 Burgers and the EOC office.

20 35. Officer Drouin testified at trial that after Mr. Alvarez was arrested on January 12, 1994,
21 there no further robberies like the ones at Tom's Burgers. Officer Drouin testified that there were no
22 robberies with the same modus operandi, the same physical description of the robber, or in the same
23 geographic area.⁵⁵ Officer Drouin also testified that the fact that the robber pretended to be a
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27 ⁴⁹ Mr. Alvarez's Writ, pages 17 and 18.

28 ⁵⁰ Mr. Alvarez's Writ, pages 18 and 19.

29 ⁵¹ Mr. Alvarez's Writ, page 18.

⁵² Mr. Alvarez's Writ, page 19.

⁵³ Mr. Alvarez's Writ, page 19.

⁵⁴ Mr. Alvarez's Writ, page 64.

1 customer and brought merchandise to the cash register before the robbery began was "very, very
2 rare."⁵⁶

3 36. Mr. Alvarez states that the *modus operandi* evidence influenced the jury. Mr. Alvarez
4 argued that the evidence of Mr. Silva's robberies would have impeached the officer's testimony that the
5 robberies Mr. Alvarez was charged with were very distinctive. Further, he argued that the prosecutor's
6 failure to disclose this evidence was misconduct, and a *Brady* violation.⁵⁷

7 37. Mr. Alvarez's attorney during trial did introduce evidence of a photo of Mr. Silva. In
8 addition, his attorney did elicit testimony from the investigator that Mr. Silva had been charged with
9 robberies in the area as well as the dates of those November 1994 robberies and the December 1994
10 arrest of Mr. Silva.⁵⁸

11 38. The Los Angeles District Attorney's Office did not oppose Mr. Alvarez's Writ. Deputy
12 District Attorney Zajec found that based on the prosecution's failure to disclose information pertaining
13 to the Silva crimes, Mr. Alvarez was unavoidably prejudiced.⁵⁹ According to Mr. Zajec, the reports on
14 the Silva crimes show that the perpetrator of the November 1994 crimes that Mr. Silva was charged
15 with employed an identical *modus operandi* as Mr. Alvarez.⁶⁰ However, Mr. Zajec noted that although
16 Mr. Alvarez was prejudiced by the nondisclosure, it did not mean that he was factually innocent.
17 Mr. Alvarez failed a polygraph test and only one eyewitness ever identified Mr. Silva as the perpetrator.
18 Therefore, although Mr. Zajec recommended the District Attorney's Office concede to the Petition for
19 Writ of Habeas Corpus based on the *Brady* violation, he was not convinced of Mr. Alvarez's
20 innocence.⁶¹

21 39. The AG recommended denial of Mr. Alvarez's claim based on: 1) that while Mr. Alvarez
22 argues that the convictions are based in part on several eyewitnesses who recanted their testimony,
23 they have not exonerated Mr. Alvarez by identifying Mr. Silva; 2) the only thing Mr. Alvarez has shown
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27 ⁵⁵ Mr. Alvarez's Writ, page 64.

⁵⁶ Mr. Alvarez's Writ, page 25.

⁵⁷ Mr. Zajec's memo of August 22, 2002, page 2.

⁵⁸ Attorney General Runte's letter of September 22, 2003, page 1 and John Zajec's Memorandum of August 22, 2002..

⁵⁹ Mr. Zajec's memo of August 22, 2002, page 3.

⁶⁰ Attorney General Runte's letter of September 22, 2003, page 1 and John Zajec's memo of August 22, 2002.

1 is that several witnesses could not with all assurance testify months after the robbery that based on his
2 physical appearance, he was the perpetrator; and 3) all the witnesses, with the exception of
3 Mr. Brambila, identified Mr. Alvarez immediately after the robberies and it is reasonable to assume that
4 their recollection of events would be sharper immediately after the robberies rather than a nearly a year
5 later. The Attorney General is not convinced by a preponderance of the evidence that Mr. Alvarez is an
6 innocent man.⁶²

7 **Determination of Issues**

8 1. A person convicted and imprisoned for a felony may submit a claim to the Board for
9 pecuniary injury sustained through his erroneous conviction and imprisonment. (Pen. Code, § 4900.)
10 The claim must be filed *within six months judgment* of acquittal or discharge, or after pardon granted,
11 or after release from imprisonment. (Pen. Code, § 4901.) (Emphasis added.)

12 2. According to Mr. Alvarez's claim, he was wrongfully incarcerated for six years, one
13 hundred and sixteen days. The court granted Mr. Alvarez's Writ of Habeas Corpus on
14 September 9, 2002. According to CDC, Mr. Alvarez was released from prison on
15 September 11, 2002. The Board received the claim on March 12, 2003. Penal Code section 7,
16 subdivision 13, defines "month" as a calendar month unless otherwise expressed. Mr. Alvarez filed
17 his claim six months and one day after he was released from prison. It appears that Mr. Alvarez failed
18 to file a timely claim.

19 3. If the Board finds that the claim is timely, the claimant must prove the following: (1)
20 that the crime with which he was charged was either not committed at all, or, if committed, was not
21 committed by him; (2) that he did not by any act or omission on his part, either intentionally or
22 negligently, contribute to the bringing about of the arrest or conviction for the crime; and (3) he
23 sustained pecuniary injury through the erroneous conviction and imprisonment. (Pen. Code, § 4903.)
24 The Board may consider any information that it deems relevant to the issues.
25 (Cal. Code Regs., tit. 2, § 641.) The claimant has the burden of proving his innocence by a
26 preponderance of the evidence. (*Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588 fn 7,
27 185 Cal.Rptr.2d 511, 516 fn 7.)

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29 ⁶¹ Attorney General Runte's letter of September 22, 2003, page 4.

1 4. If a claimant meets the requirement of Penal Code section 4903, the Board shall
2 report the facts of the case and its conclusion to the Legislature with a recommendation that the
3 Legislature make an appropriation to indemnify the claimant for his pecuniary injury
4 (Pen. Code, §4904.) The appropriation recommended shall be a sum equal to \$100 per day of
5 incarceration served after the claimant's conviction.

6 5. Within three to six weeks following the robberies at Tom's, all the eyewitnesses, with
7 the exception of Mr. Brambila, identified Mr. Alvarez as the perpetrator. Mr. Alvarez claims that his
8 attorney was incompetent for failing to refute the accuracy of eyewitness testimony. That is, that
9 several factors can play into a person's ability to accurately perceive and identify the perpetrator
10 during the commission of a crime. At the same time, Mr. Alvarez claims that these eyewitnesses
11 accurately describe Mr. Silva.

12 6. Mr. Alvarez states that his physical appearance is markedly different from the
13 description of the robber. However, the jury heard the varying descriptions and observed
14 Mr. Alvarez's appearance. Even in light of the inability of some of the eyewitness at trial to identify
15 Mr. Alvarez as the perpetrator and the varying description of the robber's physical appearance, the
16 jury convicted Mr. Alvarez.

17 7. Mr. Alvarez claims that he had alibi witnesses that his attorney failed to call.
18 Mr. Alvarez did not supply any declaration from these eyewitnesses or even from himself. Even in
19 light of this claimed information, the District Attorney and the Attorney General still held the belief that
20 Mr. Alvarez was not an innocent man. It is highly suspicious that if the evidence from these witnesses
21 is so strong that: 1) his attorney did not call them; and 2) that Mr. Alvarez has not moved for a finding
22 of factual innocence.

23 8. The jury heard some evidence of Mr. Silva's and his crimes. They still convicted
24 Mr. Alvarez. Mr. Alvarez failed a polygraph test and to date, only one eyewitness has ever identified
25 Mr. Silva as the perpetrator.

26 9. The District Attorney's Office did not oppose the writ because they held the opinion
27 that Mr. Alvarez was prejudiced by the prosecutor's failure to disclose information pertaining to
28 Mr. Silva's crimes. However, Deputy District Attorney Zajec does not believe that Mr. Alvarez is
29 innocent of these charges.

1 10. According to the documentation provided by Mr. Alvarez, the court, in granting the
2 Writ, did not comment on Mr. Alvarez' guilt or innocence. The mere fact that this charge was
3 dismissed does not prove Mr. Alvarez is innocent. A habeas proceeding is not a determination of
4 innocence and the granting of the writ does not constitute an acquittal.

5 (*In re Cruz* (2003) 104 Cal.App.4th 1339, 1246.)

6 11. Mr. Alvarez has at least 25 prior armed robbery convictions. *In re Fahey* (1973) 8 Cal.
7 3rd 842), the court defined moral turpitude crimes "as 'an act of baseness, vileness of depravity in the
8 private and social duties which a man owes to his fellowmen, or to society in general, contrary to the
9 accepted and customary rule of right and duty between man and man.' " (*Fahey* at p. 849.) A prior
10 conviction involving moral turpitude may be used to impeach a witness in a criminal proceeding. A
11 crime of moral turpitude indicates a general readiness to do evil. (*People v. Rivera* (2003) 107
12 Cal.App.4th 1374; *People v. Martinez* (1985) 175 Cal.App.3d 881, 888 - 889.)

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15 12. Robbery is a crime involving "moral turpitude" (*People v. Collins* (1986) 42 Cal.3d. 378,
16 395.) Mr. Alvarez's veracity is therefore suspect.

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18 13. To prevail, the claimant must carry the burden of proof of innocence by a
19 preponderance of the evidence. (*Diola v. State Board of Control* (1982) 13 Cal. App.3d 580.) Based
20 on the findings of fact, in paragraphs 2 – 38, it is found that Mr. Alvarez's claim is denied because the
21 claimant has not has not carried the burden of proving his innocence by a preponderance of the
22 evidence.
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BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD
OF THE STATE OF CALIFORNIA

Order

The claim under Penal Code section 4900 *et seq.* is denied.

Date: October 20, 2004


DEBORAH BAIN
Hearing Officer